

Strack and Van Til Supermarkets d/b/a Town & Country Supermarkets and Ultra Foods and United Food and Commercial Workers Union, Locals 700 and 881, a/w United Food and Commercial Workers International Union, AFL-CIO, CLC

Thomas E. Schmal and Other Partners d/b/a C&T Properties and United Food and Commercial Workers Union, Locals 700 and 881, a/w United Food and Commercial Workers International Union, AFL-CIO, CLC

Independent Employees Union of Northwest Indiana and United Food and Commercial Workers Union, Locals 700 and 881, a/w United Food and Commercial Workers International Union, AFL-CIO, CLC

Strack and Van Til Supermarkets d/b/a Town & Country Supermarkets and United Food and Commercial Workers Union, Local 700, a/w United Food and Commercial Workers International Union, AFL-CIO, CLC. Cases 25-CA-25780-3, 25-CA-25780-4, 25-CA-25780-5, 25-CA-26033, 25-CA-26053-1, 25-CA-26053-2, 25-CB-8069-2, 25-CB-8088, 25-CB-8104, and 25-CA-26209

January 14, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS
SCHAUMBER AND WALSH

On February 22, 2000, Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent Independent Employees Union of Northwest Indiana (hereafter IEU), the Respondent Strack and Van Til Supermarkets d/b/a Town & Country Supermarkets and Ultra Foods (Strack), and the Respondent Thomas E. Schmal and Other Partners d/b/a C&T Properties (C&T) each separately filed exceptions and a supporting brief. The General Counsel filed an answering brief to the Respondents' exceptions. Strack and C&T filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to

¹ No exceptions have been filed to the judge's finding that IEU violated Sec. 8(b)(1)(A) of the Act by warning employees that it would represent them and process their grievances only if they joined IEU, and by telling employees that Strack's Portage store was a closed shop and they were required to join IEU as a condition of continued employment.

affirm the judge's rulings, findings,² and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.³

These consolidated cases arise in the context of a challenge to an incumbent union mounted by a rival labor organization. The judge found that all three Respondents (the incumbent Union, the Employer, and an alleged agent of the Employer) restrained and coerced employees in the exercise of their statutory rights. For the reasons discussed below, we affirm the judge's decision in part and reverse in part.

Introduction

Strack operates 10 retail grocery stores. Employees at seven of those stores are represented for collective bargaining by United Food and Commercial Workers Union, Local 881, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC (UFCW Local 881). The IEU is the collective-bargaining representative of the employees at Strack's remaining three stores, which are located in Merrillville, Portage, and Valparaiso, Indiana. The most recent collective-bargaining agreement between Strack and IEU covering those three locations was effective from February 11, 1994 to February 10, 1998.

In early November 1997, as the expiration of the Strack-IEU contract was approaching, UFCW Local 881 and UFCW Local 700⁴ commenced a campaign to organize the employees at Strack's three locations that were represented by the IEU, and filed a representation petition in the three-store bargaining unit.⁵ In furtherance of the UFCW campaign, some of Strack's employees, including Annette Peters, who assisted the UFCW organizational campaign, engaged in picketing and handbilling in front of the three stores. The issues presented in this proceeding stem from the competition between the IEU and the UFCW Locals to represent Strack's employees at the three locations.

The judge found, and we agree, that IEU violated Section 8(b)(1)(A) and 8(b)(2) of the Act by requesting that

² Strack has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We shall modify the judge's recommended Order to conform to the violations found, and to accord with our decisions in *Ferguson Electric Co.*, 335 NLRB 142 (2001), and *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

⁴ United Food and Commercial Workers Union, Local 700 and Local 881, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC (hereafter UFCW).

⁵ The record shows that an election has not been conducted.

Strack suspend and discharge Annette Peters because of her dissident union activity. We reverse, however, the judge's finding that Strack violated Section 8(a)(3) and (1) of the Act by suspending and discharging Peters.

The judge additionally found, and we agree, that Strack violated Section 8(a)(1) of the Act by: (1) prohibiting its employees from engaging in picketing and handbilling on behalf of UFCW near the entrance and exit of its stores, threatening employees with arrest for doing so, and causing the arrest of one employee engaged in such activity; (2) engaging in surveillance of employees' union picketing and handbilling; and (3) threatening and interrogating employees with respect to their union activity.

Finally, we reverse the following findings of the judge: (1) that Strack violated Section 8(a)(1) of the Act by photographing and videotaping employees engaged in union picketing and handbilling, and by giving employees the impression of surveillance of such union activity; and (2) that C&T, the lessor of Strack's Portage store, violated Section 8(a)(1) by causing the removal of Strack's employees engaged in union picketing and handbilling. We shall address each of these issues in turn.

The Allegations Concerning Annette Peters

1. Respondent IEU

We agree with the judge, for the reasons set forth by him, that IEU violated Section 8(b)(1)(A) and 8(b)(2) of the Act by requesting that Strack suspend and discharge Annette Peters because of her dissident union activity.

Peters was employed at Strack's Portage store. She was an active member of IEU and, at the time of her discharge, was the IEU trustee for the Portage store responsible for processing grievances for unit employees. Following the commencement of the UFCW organizing campaign at the three stores, however, Peters signed a UFCW authorization card and assisted in the UFCW organizational campaign.

Peters opposed the efforts of IEU President John Rongers to seek a ratification vote of a successor Strack-IEU contract reached after only a few negotiating sessions. She also opposed his effort to conduct separate ratification meetings at each of the three locations rather than a single ratification meeting of all unit employees. On December 19, 1997,⁶ Peters telephoned Rongers at his workplace at the Merrillville store regarding these matters as well as wage issues concerning unit employees. Angry about his failure to return her previous telephone calls, she stated to him "next time I see you I'm going to kick your ass. I'm not afraid of you." At the IEU ratification meeting held December 22, Peters re-

peated her statement to Rongers while vocally challenging his stewardship of the IEU and opposing ratification of the proposed successor Strack-IEU contract.

On December 24, Rongers registered a complaint with Strack asserting that Peters had threatened him in the December 19 telephone call. Strack thereafter suspended and discharged Peters pursuant to its handbook rule which provides: "Fighting, immoral acts, threats, or intimidation aimed at customers or employees will not be tolerated. Suspension or termination will result."

Applying *Wright Line*⁷ the judge concluded that the IEU violated Section 8(b)(2) and 8(b)(1)(A) by seeking the suspension and discharge of Peters because of her dissident union activity. IEU argues in its exceptions, inter alia, that it did not violate the Act because, even in the absence of Peters' dissident union activity, Rongers would have taken the same action of reporting to Strack Peters' asserted threat because he feared bodily harm from her, and threats of workplace violence "cannot be taken lightly." The judge found, however, and we agree, that Rongers seized upon Peters' conduct as a pretext for getting rid of her because of her dissident union activity of openly opposing Rongers' administration of IEU and his efforts to quickly obtain ratification of a successor collective-bargaining agreement with Strack.

The judge's finding of pretext is supported by the following factors. First, the record shows and the judge found that Rongers, after approximately 14 years as IEU president, knew full well that Strack, pursuant to its handbook rule, discharged employees for making threats to employees or customers. Rongers thus understood that his complaint to Strack would in all likelihood result in Strack's termination of Peters.⁸ Second, the judge essentially discredited Rongers' testimony that he genuinely feared physical harm from Peters based on her statement. Thus, there is no credited record evidence supporting IEU's claim that Rongers considered Peters' December 19 statement to be sufficiently serious to warrant reporting a complaint to Strack.⁹ Finally, Rongers did not report his complaint to Strack until after Peters' strident opposition to Rongers' administration of IEU at the December 22 ratification meeting. These facts estab-

⁷ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). See *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB 1042, 1044 (1997) (applying *Wright Line* analytic framework to alleged discrimination by a union).

⁸ The judge observed that the record fails to show that IEU had ever filed a complaint with Strack against any other bargaining unit member.

⁹ We note that the record does not show any past altercations between Rongers and Peters.

⁶ All dates in December are in 1997.

lish that Rongers¹⁰ seized on this isolated episode as a pretext to purge the bargaining unit¹¹ of a vocal opponent to Rongers' administration of IEU.¹²

2. Respondent Strack

The judge found that Strack violated Section 8(a)(3) and (1) of the Act by suspending and discharging Peters. In its exceptions, Strack argues that it had no knowledge of Peters' involvement with the UFCW and that, in any event, it established that it would have taken the same actions against her even in the absence of her protected activity. Applying the well-established *Wright Line* framework for deciding this issue turning on Strack's motivation, we find merit in Strack's contentions.

Wright Line first requires the General Counsel to establish by a preponderance of the evidence that the employee's protected activity was a substantial or motivating factor in the challenged employer decision. The elements commonly required to show discriminatory motivation are that the employee was engaged in union activity, that the employer had knowledge of that activity, and that the employer harbored antiunion animus. See, e.g., *Sears, Roebuck & Co.*, 337 NLRB 443 (2002).¹³ Once the General Counsel makes such a showing, the burden of persuasion "shift[s] to the employer to demonstrate

that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra, at 1089.

We find that the General Counsel has not met his burden of showing that Peters' protected dissident union activity on behalf of the UFCW was a motivating factor in her suspension and discharge. The evidence does not establish that Strack was aware of Peters' pro-UFCW sentiment. Indeed, the judge found that the converse was true; that Peters was careful not to "disclose her sentiment" to Strack and further advised Strack that "she did not know anything about UFCW." Thus, although Peters was clearly engaged in protected dissident union activity on behalf of the UFCW, there is simply no record evidence to establish that Strack had knowledge of that activity when Rongers filed his complaint against Peters. We accordingly cannot find that the General Counsel has carried his burden of demonstrating that Peters' protected activity was a substantial or motivating factor in her suspension and discharge. *Tomatek, Inc.*, 333 NLRB 1350, 1355 (2001) ("it is axiomatic that the employer could not have been 'motivated' by the employee's protected activity if the employer didn't know about any such activity").

Assuming arguendo that the General Counsel satisfied his initial burden under *Wright Line*, we find that Strack has proven its affirmative defense under *Wright Line* of demonstrating that it would have taken the same action of suspending and discharging Peters even in the absence of her protected activity. The record shows that Strack had a well-established rule in its personnel handbook prohibiting "threats or intimidation" aimed at coworkers and that the rule affirmatively provides that suspension or termination "will result" from such proscribed conduct. Peters herself conceded at the hearing that she was aware of the rule, and that she was further aware that Strack had discharged employees for violating the rule. Strack further documented more than a dozen instances in which it discharged employees for violations of the rule similar in nature to that of Peters' misconduct of threatening a coworker. Strack has thus shown undisputed evidence that it has a published policy that was in existence prior to the commencement of Peters' protected activity, that the policy unambiguously imposes discharge as the penalty for the proscribed conduct, and that Strack had invoked the policy on numerous previous occasions to discharge those who violated the policy. In light of Strack's consistent application to Peters of its established policy, we find that Strack has met its burden

¹⁰ We agree with the judge's finding, for the reasons set forth by him, that Rongers registered his complaint with Strack as president of IEU.

¹¹ In agreeing with the judge that IEU unlawfully requested that Strack suspend and discharge Peters, we do not rely on the judge's finding that Peters withdrew her statement to Rongers.

¹² In denying the defense of collateral estoppel, Chairman Battista notes that neither the Charging Party nor the General Counsel was a party to the lawsuit. Further, the issues in the lawsuit (breach of contract and breach of duty of fair representation) are not the same as the unfair labor practice issues now before the Board.

¹³ Member Schaumber notes that the Board, administrative law judges, and circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as a fourth element the necessity for there to be a causal nexus between the union animus (i.e., Sec. 7 animus) and the adverse employment action. See e.g. *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). Member Schaumber agrees with this addition to the formulation. The existence of protected activity, employer knowledge of the same, and animus (i.e., Sec. 7 animus) may not, standing alone, provide the causal nexus sufficient to conclude that the protected activity was a motivating factor for the adverse employment action. For example, the 8(a)(1) conduct of a supervisor, while imputed to the employer, may have no relation to adverse employment action taken by another supervisor against an employee who happened to be engaged in Sec. 7 activities. Member Schaumber believes it would be preferable in the near future for the Board to adopt and thereafter consistently apply a single statement of the elements of proof, but it is not necessary to address the issue here in deciding that the General Counsel has failed to meet his burden, or that, assuming the burden was met, Strack proved its affirmative defense of showing it would have taken the same action even in the absence of protected activity.

of proving that it would have suspended and discharged Peters even in the absence of her protected activity.¹⁴

Our dissenting colleague argues that the protected activity was Peters' exchange with Rongers, that Peters' conduct did not remove the exchange from the protection of Section 7, and that therefore the Respondent could not discharge Peters for that conduct.

We disagree. Assuming *arguendo* that Peters' complaint to Rongers about contract ratification was within the ambit of Section 7, Peters' threat in that conversation was not protected by Section 7. Peters threatened Rongers with physical harm. The Respondent had a rule against such threats.¹⁵ In our view, a threat of physical harm, like that involved herein, is not within the ambit of Section 7. It is more than insult and name-calling. Where, as here, an employer has a rule against such threats, the employer is not required to discriminate in favor of Section 7 by permitting such threats in a Section 7 context and prohibiting it in all other contexts.

The cases cited by our colleague are inapposite. *Leasco, Inc.*, 289 NLRB 549 fn. 1 (1988), says that a threat to "kick ass," without more, i.e., standing alone, is insufficient to remove otherwise protected activity from the ambit of Section 7. In the instant case, the threat is made in the context of an angry dispute between two union rivals. Further, it was followed by the ominous comment "I'm not afraid of you." That is more than mere "colloquialism" and "mere bravado." It is a physical challenge. And, even if there is ambiguity in regard to whether it is a physical challenge, an employer does not have to wait to see whether it was a real challenge.

Similarly, *Lamar Advertising of Janesville*, 340 NLRB No. 114, slip op. at 3 (2003), and *NLRB v. Bostik Division*, 517 F.2d 971, 973-974 (6th Cir. 1975) are distinguishable. These cases involved the issue of whether an election should be set aside because of certain statements. By contrast, the issue here is whether conduct is immune from employer discipline.

For these reasons, we shall accordingly dismiss this complaint allegation.

Employee Picketing and Handbilling

The judge found that Strack violated Section 8(a)(1) of the Act by prohibiting its employees from engaging in picketing and handbilling on behalf of UFCW near the exit and entrance of its Portage and Valparaiso stores; threatening employees with arrest for such picketing and

handbilling in front of its Valparaiso store; and causing the arrest of one employee handbilling on behalf of UFCW in front of the Portage store. For the reasons set forth below, we agree with the judge's findings.

On May 28, 1998,¹⁶ Strack employees along with UFCW staff members engaged in picketing and handbilling in front of Strack's Portage store. Strack's manager of the Portage store telephoned the police and asked them to remove the picketers from the front of the store. The police directed the picketers to move to the sidewalk near the street entrances to the shopping center. The picketers complied, asserting, however, that Strack employees were entitled to picket in front of the store. Picketing and handbilling at the Portage store at the location designated by the police continued over the ensuing months. On August 5, Strack employee Jeff Kimbrough was arrested for picketing in front of the Portage store rather than the designated location. Kimbrough was employed at the Portage store.

Commencing on July 9, similar picketing and handbilling by both Strack employees and UFCW staff members occurred in front of the entrance and exit to Strack's Valparaiso store. The Valparaiso assistant store manager warned the picketers that they were not allowed in front of the store, and called the police. The police directed the picketers to move to a location near the street entrance to the shopping center, and they complied. The picketing and handbilling thereafter continued from the location designated by the police. The picket signs and handbills at both locations stated that Strack was unfair to its employees, complained that Strack controlled IEU and thereby deprived its employees of the benefits of collective bargaining, and asked the public not to shop at Strack.

Although both employees and nonemployee UFCW staff members engaged in the picketing and handbilling, the consolidated complaint as finally constituted in this proceeding (hereafter complaint) alleged that Strack interfered only with the rights of *employees* to engage in picketing and handbilling at the entrance and exit areas of Strack's Portage and Valparaiso stores. Our analysis is accordingly limited to the rights of Strack employees to engage in such conduct.¹⁷

The Section 7 right of employees to organize on their Employer's property differs fundamentally from the rights of nonemployee union organizers. *Gayfers De-*

¹⁴ See, e.g., *Azalea Gardens Nursing Center*, 292 NLRB 683, 688-689 (1989).

¹⁵ Contrary to the suggestion of our colleague, we are not separating Peters' remark to Rongers from Peters' protected activity (protection assumed *arguendo*). Rather, we believe that Peters' remark constituted misconduct, albeit within the course of protected activity.

¹⁶ All dates hereafter are in 1998.

¹⁷ It is accordingly unnecessary to address the judge's discussion, and the parties' arguments, concerning access by nonemployee union organizers to the entrance and exit areas of Strack's stores to engage in picketing and handbilling.

partment Store, 324 NLRB 1246, 1249 (1997). As the Board explained in *Gayfers*:

The Supreme Court has recognized a “distinction of substance” between the rights of employees who are rightfully on the employer’s property pursuant to the employment relationship and nonemployee union organizers, and distinctly different rules of law apply to each. Under *Republic Aviation [Corp. v. NLRB]*, 324 U.S. 793 (1945), the standard governing the rights of employees, an employer may not bar the distribution of union literature in nonworking areas of its property during nonworking time unless the employer can justify its rule as necessary to maintain discipline and production. 324 U.S. at 113. [324 NLRB at 1249.]

In contrast, nonemployee union organizers may be treated as trespassers, and are entitled to access to the premises only if they have no reasonable nontrespassory means to communicate their message. *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). The critical distinction is that employees are not strangers to the employer’s property, but are already rightfully on the employer’s property pursuant to their employment relationship, thus implicating the employer’s management interests rather than its property interest. *Hudgens v. NLRB*, 424 U.S. 507, 521 fn. 10 (1976); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 571–573 (1978). In sum, under *Republic Aviation*, supra, off-duty employees may engage in protected solicitation and distribution in nonwork areas of the employer’s property.

In justification of its actions taken against the picketers, Strack points to its receipt of some complaints from customers concerning the conduct. The judge found, however, that these complaints on the whole involved a “variety of annoyances” such as placing fliers on the windshields of cars or into passing cars.¹⁸ Strack’s documentation of a few instances of misconduct, which occurred only sporadically over a period of several months, does not amount to substantial evidence establishing that a ban on picketing and handbilling was justified.

Strack additionally argues in its exceptions that the entrance and exit areas of its Portage and Valparaiso stores are work areas, and that “therefore a rule against employee solicitation in such areas is presumably valid to prevent disruption to the employer’s business.” Strack does not argue, however, and the record does not show, that Strack in fact maintains a rule regarding employee solicitation and distribution. Indeed, the judge found that Strack has not had a written policy regarding solicitation

or distribution at its stores.¹⁹ Thus, Strack cannot justify its prohibition against employee picketing and handbilling by relying on a valid rule regarding employee solicitation and distribution in work areas.

For all the above reasons, we find that Strack violated Section 8(a)(1) of the Act by prohibiting its employees from engaging in picketing and handbilling on behalf of UFCW near the exit and entrance of its Portage and Valparaiso stores; threatening employees with arrest for such picketing and handbilling in front of its Valparaiso store; and causing the arrest of employee Jeff Kimbrough for handbilling on behalf of UFCW in front of the Portage store.²⁰

Photographing and Videotaping of Employee Picketing and Handbilling and Additional Surveillance Allegations

1. Photographing

The judge found that Strack violated Section 8(a)(1) of the Act by photographing and videotaping employees engaged in picketing and handbilling. We have reviewed the record evidence and find that it does not support the judge’s finding.

The principles governing whether employer surveillance, photographing, and videotaping of protected employee activity violates the Act are well established:

[A]n employer’s mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. Photographing and videotaping such activity clearly constitute more than mere observation, however, because such pictorial recordkeeping tends to create fear among employees of future reprisals. The Board in *Woolworth* [310 NLRB 1197 (1993)] reaffirmed the principle that photographing in the mere belief that something might happen does not justify the employer’s conduct when balanced against the tendency of that conduct to interfere with employees’ right to engage in concerted activity. *Id.*, *Flambeau Plastics Corp.*, 167 NLRB 735, 743 (1967), *enfd.* 401 F.2d 128 (7th Cir. 1968), *cert. denied* 393 U.S. 1019 (1969). Rather, the Board requires an employer engaging in

¹⁹ Strack asserts only that it has had a long-term unwritten policy limiting solicitation at its stores to charitable or non-profit groups.

²⁰ The record shows that at least one of the employees (Deborah McDaniels) involved in the picketing and handbilling at Strack’s Portage store in fact worked at Strack’s Valparaiso store. We find it unnecessary to pass on whether Strack violated the Act by denying access to such employees who engaged in picketing and handbilling at a site other than the one at which they worked, because such a finding would be cumulative of our finding as to employees who engaged in such activity at the site where they worked, and thus would not affect the Order in this proceeding.

¹⁸ Two complaints asserted blockage of the store entrance by picketers. Other complaints concerned the use of foul language.

such photographing or videotaping to demonstrate that it had a reasonable basis to have anticipated misconduct by the employees. “[T]he Board may properly require a company to provide a solid justification for its resort to anticipatory photographing.” *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 701 (7th Cir. 1976).

National Steel & Shipbuilding Co., 324 NLRB 499 (1997), enf.d. 156 F.3d 1268 (D.C. Cir. 1998).

Strack argues in its exceptions that it had a reasonable basis to have anticipated misconduct that justified its photographing and videotaping of the employee picketing and handbilling. The record evidence fully supports the Respondent’s position.

There is no doubt that Strack was subjected to unprotected picketing engaged in by pro-UFCW employees and nonemployees in front of its Merrillville store on February 7. The judge found, and no party disputes, that the picketers at Merrillville on that date “extended across the front of the store, standing shoulder to shoulder across both its entrance and its exit” and that “two large dogs accompanied the demonstrators.” The report filed by the Merrillville police department documented that “the demonstrators impeded vehicles in front of the store” as well as the “intimidating effect on customers of the [picketers] and two large dogs with them near the store entrance.” Strack’s security personnel were instructed to take pictures only if the picketers blocked the store entrances, and they did so when the misconduct started in order to obtain evidence to support a court injunction to prevent future misconduct. In sum, the record shows that Strack, when presented with this unstable situation and to obtain evidence for court proceedings, was fully justified in photographing the picketing at the Merrillville store on February 7. See, e.g., *Cable Car Charters*, 324 NLRB 732 fn. 2 (1997); *Concord Metal, Inc.*, 295 NLRB 912, 921 (1989). Indeed, the General Counsel does not even allege that the picketing at the Merrillville store on that date was protected activity.

Pro-UFCW picketing resumed in front of Strack’s Portage store on May 28. No assurance was forthcoming by the UFCW to Strack that a recurrence of the February 7 confrontation would not result. Strack accordingly instructed its security personnel to photograph the picketing to obtain additional evidence for court proceedings. We have little difficulty in finding that Strack, based on the undisputed misconduct it had endured during the previous picketing, had a reasonable basis to anticipate further misconduct. This is not a case in which an employer engages in unlawful anticipatory photographing of employees engaged in protected activity on the “mere belief

that something might happen[.]” *National Steel & Shipbuilding Co.*, supra, 324 NLRB 499. Rather, misconduct *had happened* during the previous picketing, and Strack was reasonably concerned with preserving customer access to its store.

The record further shows that Strack was justified in photographing subsequent picketing that took place at its Valparaiso store on July 12. In that incident, picketing pro-UFCW employees first assembled. Then, additional Strack employees commenced counter-picketing in favor of the incumbent Union IEU. Strack was thus confronted with rival picketers in close physical proximity during a heated campaign by two union adversaries competing to represent its employees. Strack was aware that hostile confrontations had already occurred between employees favoring the rival unions, i.e., Peters’ confrontation with Rongers. Further, Strack had already endured the UFCW’s volatile picketing on February 7 in front of its Merrillville store, in which the picketers blocked both the store entrance and the exit. In these circumstances, we find that Strack had a solid justification for photographing the July picketing.²¹ We shall accordingly dismiss the allegation that Strack engaged in unlawful photographing and videotaping of employee picketing and handbilling.

2. Additional surveillance allegations

The judge additionally found that, during the February 7 Merrillville picketing discussed above, Strack violated Section 8(a)(1) of the Act by creating the impression that it was engaging in surveillance of its employees’ picketing and handbilling on behalf of UFCW. The basis for this finding was that Strack’s personnel on that date appeared to be writing down names of picketers and messages on the picket signs. As we have explained above, however, Strack was justified in attempting to document the misconduct and blockage that occurred at the unprotected February 7 rally to gather evidence for court proceedings. We shall accordingly dismiss the allegation that Strack unlawfully created the impression that it was engaging in surveillance of its employees’ picketing and handbilling on February 7.²²

²¹ We find, contrary to the dissent, that the unprotected nature of the February 7 Merrillville picketing provided justification for Strack’s photographing or videotaping of all subsequent picketing activity. The dissent errs in focusing on whether further misconduct in fact occurred after February 7. Rather, the relevant inquiry is whether Strack had a reasonable basis to anticipate further misconduct after February 7.

²² We agree with the judge, however, for the reasons set forth by him, that Strack violated Sec. 8(a)(1) of the Act by engaging in additional surveillance of its employees’ picketing and handbilling on behalf of UFCW. We also agree with the judge, for the reasons set forth by him, that Strack violated Sec. 8(a)(1) of the Act by threatening and interrogating employees with respect to their union activity. Member

The Judge's Finding Concerning C&T

The judge found that C&T, acting as Strack's agent, violated Section 8(a)(1) of the Act by telephoning and writing the mayor of Portage, Indiana, seeking police intervention to prevent employees from picketing on behalf of UFCW in front of Strack's Portage store. The record evidence before us does not support the judge's finding of agency, however. We shall accordingly dismiss this complaint allegation.

C&T is the lessor of Strack's Portage store. About May 11, Strack's Portage store manager Doug Smith telephoned the managing partner of C&T, Thomas E. Schmal, and asked Schmal to contact the mayor of Portage to stop picketing expected by Strack in front of the Portage store. Schmal thereafter contacted the mayor and asked that the Portage police department prevent picketing on the shopping center property. The judge found that Schmal contacted the mayor "at Strack's request and in C&T's interest."

The Board's consideration of questions of agency under the NLRA is guided by the following settled principles:

It is well established that, under Section 2(13) of the Act, employers and unions are responsible for the acts of their agents in accordance with ordinary common-law rules of agency. *Longshoremen Local 1814 ILA v. NLRB*, 735 F.2d 1384, 1394 (D.C. Cir. 1984) ("Beyond doubt, the legislative intent of [Section 2(13)] was to make the ordinary law of agency applicable to the attribution of individual acts to both employers and unions."). And, under "hornbook agency law[,] . . . an agency relationship arises only where the principal 'has the right to control the conduct of the agent with respect to matters entrusted to him.'" *Longshoremen ILA v. NLRB*, 56 F.3d 205, 213 (D.C. Cir. 1995) (quoting Restatement (Second) of Agency Sec. 14 (1958)[.]

Overnite Transportation Co., 333 NLRB 472, 474 (2001).

Although finding C&T to be Strack's agent, the judge did not address the question of whether Strack had the right to control the conduct of C&T.²³ C&T argues in its exceptions that Strack did not have the right to control the conduct of C&T, but merely requested that it contact the mayor of Portage. The General Counsel in his an-

Schaumber agrees with the latter finding with respect to the interrogation of employee Scott by manager Gardiola, and finds it unnecessary to pass on the additional allegations. No exceptions were filed to the judge's finding that manager Gardiola unlawfully interrogated employee Novotny.

²³ The judge relied on Sec. 2(2) of the Act, which defines "employer" to include "any person acting as an agent of an employer."

The General Counsel does not contend, and the judge did not find, that C&T is an employer in its own right.

swering brief has not directed our attention to any evidence establishing the element of control. Indeed, we can find no evidence in the record before us establishing that Strack had the right to control the conduct of C&T. In the absence of this necessary element to the formation of an agency relationship, we must dismiss this complaint allegation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that:

A. Respondent, Strack and Van Til Supermarkets d/b/a Town & Country Supermarkets and Ultra Foods, Merrillville, Portage, and Valparaiso, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union membership, activities, and sympathies.

(b) Threatening employees with loss of hours or other economic reprisals because they support United Food and Commercial Workers Union, AFL-CIO, CLC, or any other labor organization.

(c) Billing on behalf of United Food and Commercial Workers Union, Locals 700 and 881, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC, or any other labor organization.

(d) Prohibiting employees from picketing and distributing handbills on behalf of United Food and Commercial Workers Union, Locals 700 and 881, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC, or any other labor organization, at the entrance and exit areas in front of its Portage and Valparaiso stores by demanding that they leave, threatening them with arrest, calling the police to remove them, having them arrested, or in any other way interfering with such picketing and distribution.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, notify in writing the Portage, Indiana, police department, and appropriate court authorities, with a copy to Jeff Kimbrough, that the National Labor Relations Board has determined that the arrest of Kimbrough on August 5, 1998, violated the National Labor Relations Act and request in writing, with a copy to Jeff Kimbrough, that the court and the police department expunge all records of the unlawful arrest.

(b) Make Jeff Kimbrough whole for all reasonable legal fees and expenses incurred as a result of his unlawful

arrest, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days after service by the Region, post at its stores in Portage, Merrillville, and Valparaiso, Indiana, copies of the attached notice marked "Appendix A."²⁴ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by Strack and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Strack has gone out of business or closed the facilities involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Strack at any time since December 12, 1997.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. Respondent, Independent Employees Union of Northwest Indiana, Merrillville, Indiana, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Requesting Strack and Van Til Supermarkets d/b/a Town & Country Supermarkets and Ultra Foods to discharge, suspend, or otherwise discriminate against any employee because of his or her dissident union activity or other protected concerted activity.

(b) Warning employees that it would represent them or process their grievances only if they joined IEU.

(c) Telling employees that Strack's Portage store is a closed shop and that employees are required to join IEU as a condition of continued employment.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, notify Strack and Van Til Supermarkets d/b/a Town & Country Supermarkets and Ultra Foods in writing that it has no

objection to Annette Peters' reinstatement to her former position.

(b) Within 14 days from the date of this Order, notify Annette Peters in writing that it has no objection to her reinstatement to her former position.

(c) Make Annette Peters whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. Back pay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons For The Retarded*, 283 NLRB 1173 (1987). The Respondent Union's liability for backpay shall continue until Peters is reinstated by Strack and Van Til Supermarkets d/b/a Town & Country Supermarkets and Ultra Foods to her former or substantially equivalent position or until she obtains substantially equivalent employment elsewhere. See, e.g., *Sheet Metal Workers Local 355 (Zinsco Electrical Products)*, 254 NLRB 773 (1981), *enfd.* in part 716 F.3d 1249 (9th Cir. 1983).

(d) Within 14 days from the date of this Order, remove from its files, any reference to the unlawful suspension and discharge, and within 3 days thereafter notify Annette Peters in writing that it has done so and that it will not use the suspension or discharge against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its union office in Merrillville, Indiana, copies of the attached notice marked "Appendix B."²⁵ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the authorized representative of Independent Employees Union of Northwest Indiana, shall be posted by the Independent Employees Union of Northwest Indiana and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

²⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

²⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(g) Furnish signed copies of the notice marked “Appendix B” to the Regional Director for posting by the Respondent Employer at all places at its Portage, Merrillville, and Valparaiso, Indiana, stores where notices to employees are customarily posted, if the Respondent is willing to do so. Copies of that notice, after being signed by the Respondent Union’s authorized representative, shall be returned to the Regional Director for disposition by him.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found.

MEMBER WALSH, dissenting in part.

I dissent from the majority decision on two key points. First, I would find that Strack violated Section 8(a)(3) and (1) of the Act by suspending and discharging Annette Peters. Second, I would find that Strack violated Section 8(a)(1) of the Act by photographing and videotaping employees engaged in picketing and handbilling.¹

1. I agree with the majority that Strack suspended and discharged Peters because she stated to IEU President John Rongers, “John, next time I see you I’m going to kick your ass.” The record shows, however, that Peters’ statement was made in the course of her dissident union activity and was not so egregious as to remove her from the Act’s protection.²

It is well established that “not every impropriety committed during [the course of Section 7 activity] places the employee beyond the protective shield of the Act.” *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). In the frequently-cited case of *Bettcher Mfg. Corp.*, 76 NLRB 526, 527 (1948), the Board, relying on Seventh Circuit precedent, phrased the test as follows:

¹ I agree with my all of my colleagues’ other unfair labor practice findings, with the exception of their finding in fn. 20 that the Respondent violated the Act solely with respect to the employees who sought access to the stores at which they worked. Under the analysis set forth in *Hillhaven Highland House*, 336 NLRB 646 (2001), enfd. 344 F.3d 523 (6th Cir. 2003), the Respondent also acted unlawfully in prohibiting employees from having access to facilities other than the ones at which they worked.

² My colleagues find that Peters’ discharge was lawful under a *Wright Line* analysis. 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). However, it is well established that *Wright Line* is not applied where, as is the case here, the respondent’s action is motivated solely by the employee’s protected or union activity. See *Nor-Cal Beverage Co.*, 330 NLRB 610, 611–612 (2000), and cases cited therein.

A line exists beyond which an employee may not with impunity go, but that line must be drawn “between cases where employees engaged in concerted activities exceed the bounds of lawful conduct ‘in a moment of animal exuberance’ (*Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293) or in a manner not activated by improper motives, and those flagrant cases in which the misconduct is so violent or of such serious character as to render the employee unfit for further service.” [Quoting *NLRB v. Illinois Tool Works*, 153 F.2d 811, 815 (7th Cir. 1946).]

The Seventh Circuit reaffirmed this standard in *Dreis & Krump Mfg. v. NLRB*, 544 F.2d 320 (7th Cir. 1976). The court stated that it “is committed to the standard for determining whether specified conduct is removed from the protections of the Act as articulated by the Board: communications occurring during the course of otherwise protected activity remain likewise protected unless found to be ‘so violent or of such serious character as to render the employee unfit for further service.’” *Id.* at 329 (quoting *Illinois Tool Works*, supra).³

Applying this standard here, Peters’ suspension and discharge should be found to be unlawful. Peters’ participation in the UFCW organizational campaign, and her opposition to ratification of the Strack-IEU contract, fall squarely within the ambit of conduct protected by Section 7. Indeed, the judge found that Rongers intended to keep the UFCW “at bay” by bringing a contract to the IEU membership for ratification as soon as possible and that Strack agreed to do the best it could to accomplish that end. Thus, the contract ratification question was closely tied to an issue unquestionably at the heart of Section 7: the right of employees to decide which of two unions would represent them.

Furthermore, there can be no doubt that Peters’ telephone statement to Rongers on December 19, 1997 was made “in the course of” her protected dissident activity within the meaning of the above-cited precedent. The purpose of her telephone call to Rongers was to express her strong opposition to his plan to schedule separate ratification meetings at each of the three Strack stores covered under the proposed contract. Indeed, she repeatedly attempted, unsuccessfully, to reach Rongers by telephone the day before, and she left a taped message regarding the ratification issue on Rongers’ answering machine. Rongers, who knew that Peters was promoting the

³ See *Consumers Power Co.*, 282 NLRB 130, 132 (1986) (fns. omitted) (“[W]hen an employee is discharged for conduct that is part of the res gestae of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further service.”).

UFCW, did not return her call. By the time Peters finally reached Rongers on December 19, she was exasperated with his unwillingness to discuss the ratification issue, and she impulsively stated that she was “going to kick [his] ass.” Given this context, it is clear that Peters’ remark was closely connected to her dissident union activities⁴ and thus occurred “in the course of” her protected conduct.⁵

Furthermore, there is no evidence that Peters’ remarks were so flagrant as to render her unfit for further service. As the Fifth Circuit has stated, “It has been repeatedly observed that passions run high in labor disputes,” *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 731 (5th Cir. 1970), and some leeway must be given for impulsive and exaggerated utterances. See *NLRB v. Bostik Div., U.S.M. Corp.*, 517 F.2d 971, 973–974 (6th Cir. 1975) (threats to “kick ass,” are “almost inevitable in the course of a heated election campaign and most employees doubtless expect such exchanges”); *Lamar Advertising of Janesville*, 340 NLRB No. 114, slip op. at 3 (2003) (“Viewed objectively, a threat by one employee to another to “kick ass,” without more, is mere bravado that is unlikely to intimidate the listener.”) (emphasis in original); *Leasco, Inc.*, 289 NLRB 549 fn. 1 (1988) (employee’s threat to “kick [a manager’s] ass” is a “colloquialism that standing alone does not convey a threat of actual physical harm”). Strack does not argue, and nothing in the record establishes, that Peters’ statements to Rongers disrupted Strack’s operations, productivity, or discipline in any way. Rather, Strack asserts that it has uniformly applied its handbook rule against threats and intimidation by employees, and that it acted reasonably in finding that Peters violated the rule and should be discharged. A Respondent’s disciplinary policy, however, does not privilege it to discharge an employee for conduct protected by the Act. See *Consumers Power Co.*, supra, 282 NLRB at 132 fn. 15.⁶ In sum, in the absence

⁴ My colleagues assert that Strack was not aware of Peters’ pro-UFCW sentiment. Assuming arguendo that this is true, Strack was aware, as a result of its investigation of Rongers’ complaint, that Peters’ statement to Rongers occurred in the context of her opposition to the ratification of the proposed Strack-IEU contract.

⁵ The majority’s attempt to isolate Peters’ remark to Rongers as separate from her protected activity is legally and factually unavailing. The Seventh Circuit has made clear that, in analyzing protected employee conduct, the asserted impropriety “cannot be considered in a vacuum” nor “separated from what led up to it.” *NLRB v. Thor Power Tool Co.*, supra, 351 F.2d at 586. The facts here show that Peters’ remark was “part and parcel” of her ongoing protected efforts to convey to union president Rongers her opposition to the ratification of the proposed Strack-IEU contract. Id. Indeed, the majority concedes that Peters’ remark to Rongers occurred in the very same conversation as her complaint about contract ratification.

⁶ Contrary to the majority, there is no issue in this case whether the Respondent’s rule is valid, or was applied in a disparate manner. The

of a showing that Peters engaged in conduct so violent or of such serious character as to render her unfit for further service, Strack violated Section 8(a)(3) and (1) by suspending and discharging Peters.

2. I agree with the majority that Strack has presented justification for its photographing of the employee picketing and handbilling in front of its Merrillville store on February 7, 1998.⁷ I disagree with the majority, however, that the February 7 Merrillville picketing provided justification for Strack’s photographing or videotaping of all subsequent picketing activity.

The misconduct at Merrillville on February 7 does not give Strack carte blanche to photograph or videotape any and all subsequent picketing activity. Rather, Strack is still required to demonstrate that it had a reasonable basis to have anticipated further misconduct by the employees. *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997), enf. 156 F.3d 1268 (D.C. Cir. 1998). This Strack has failed to do.

Employee picketing activity resumed on May 28, 1998, and continued sporadically during the next several months. The record shows that no repetition of the February 7 misconduct took place on May 28 or thereafter. My colleagues do not dispute that all picketing after February 7 was both peaceful and protected. There was nearly a 4-month gap in time between the February 7 picketing and its resumption. In these circumstances, Strack’s justification for photographing the initial picketing does not constitute justification to continue to do so months later.⁸

Strack’s photographing of picketing on July 12 shows that it lacked a reasonable basis to anticipate further misconduct. On July 12, Strack employees at the Valparaiso store engaged in counterpicketing while picketing on behalf of UFCW was taking place. Strack’s loss prevention manager, Darrell Roberts, when informed of this circumstance, advised his subordinate that “if there was any type of disturbance to call the police immediately,” but also directed her to take pictures of the picketers “so we could determine how many [were] there.” There is, of course, no evidence that any misconduct occurred, and there was never any confrontation between the picketers

key point is that Strack may not use its rule to justify punishment of protected employee activity. See *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) (“where, as here, the [misconduct] charges directly relate to and implicate the employee[s] exercise of [a] Section 7 . . . , right the Respondent cannot apply its [threat] policy without reference to Board law”), enf. 263 F.3d 345 (4th Cir. 2001).

⁷ All dates hereafter are in 1998.

⁸ Likewise, IEU president Rongers’ complaint against Peters, an isolated incident which did not involve any actual physical confrontation, had occurred several months earlier.

of the respective unions in July or at any other time during the months-long organizing campaign.

I agree with the judge that Roberts directed that pictures be taken of the picketers, including Strack employees picketing on behalf of IEU, on the mere possibility of a confrontation between the rival factions. This establishes that Strack engaged in photographing of employees engaged in protected activity on the “mere belief that something might happen[.]” *National Steel & Shipbuilding*, supra, 324 NLRB at 499. This is precisely what the Act forbids. I would find that Strack engaged in photographing of protected activity in July without “solid justification” in violation of Section 8(a)(1) of the Act.⁹

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your union membership, activities, and sympathies.

WE WILL NOT threaten you with loss of hours or other economic reprisals because you support United Food and Commercial Workers Union, AFL–CIO, CLC, or any other labor organization.

WE WILL NOT engage in surveillance of our employees’ picketing or handbilling on behalf of United Food and Commercial Workers Union, Locals 700 and 881, affiliated with United Food and Commercial Workers International Union, AFL–CIO, CLC, or any other labor organization.

WE WILL NOT prohibit our employees from picketing and distributing handbills on behalf of United Food and Commercial Workers Union, Locals 700 and 881, affiliated with United Food and Commercial Workers Interna-

⁹ Because I agree with the majority that Strack was justified in photographing the Feb. 7 picketing, I agree for the reasons set forth in the majority decision that Strack did not unlawfully create the impression that it was engaging in surveillance of its employees’ picketing and handbilling on that date.

tional Union, AFL–CIO, CLC, or any other labor organization, at the entrance and exit areas in front of our Portage and Valparaiso stores by demanding that they leave, threatening them with arrest, calling the police to remove them, having them arrested, or in any other way interfering with such picketing and distribution.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board’s Order, notify in writing the Portage, Indiana, police department, and appropriate court authorities, with a copy to Jeff Kimbrough, that the National Labor Relations Board has determined that the arrest of Kimbrough on August 5, 1998, violated the National Labor Relations Act and request in writing, with a copy to Jeff Kimbrough, that the court and the police department expunge all records of the unlawful arrest.

WE WILL make Jeff Kimbrough whole for all reasonable legal fees and expenses incurred as a result of his unlawful arrest, with interest.

STRACK AND VAN TIL SUPERMARKETS D/B/A
TOWN & COUNTRY SUPERMARKETS AND ULTRA
FOODS

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT request that Strack and Van Til Supermarkets d/b/a Town & Country Supermarkets and Ultra Foods discharge, suspend, or otherwise discriminate against you because you engage in dissident union activity or other protected concerted activity.

WE WILL NOT warn you that we would represent you or process your grievances only if you joined IEU.

WE WILL NOT tell you that Strack's Portage store is a closed shop and that you are required to join IEU as a condition of continued employment.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, notify Strack in writing that we have no objection to Annette Peters' reinstatement to her former position.

WE WILL within 14 days from the date of the Board's Order notify in writing Annette Peters that we have no objection to her reinstatement to her former position.

WE WILL make Annette Peters whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files, any reference to our unlawful request that Strack suspend and discharge Annette Peters, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the suspension and discharge will not be used against her in any way.

INDEPENDENT EMPLOYEES UNION
OF NORTHWEST INDIANA

Joanne C. Mages, Esq., for the General Counsel.

Roger N. Gold, Esq. (Gold & Polansky), of Chicago, Illinois, for Respondent, Independent Employees Union of Northwest Indiana.

Steven R. Crist and Marilyn Reed Holscher Esqs. (Singleton, Crist, Patterson & Austgen) of Munster, Indiana, for Respondents Strack and Van Til Supermarkets and C&T Properties.

Jonathan D. Karmel, Esq. (Karmel & Gilden), of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Valparaiso, Indiana, on September 8, 9 and 10, October 26, 27, 28 and 29, November 4 and 5, and December 9, all in 1998. Upon charges filed by United Food and Commercial Workers Union, Locals 700 and 881, a/w United Food and Commercial Workers International Union, AFL-CIO, CLC, referred to, respectively, as Local 700 and Local 881, and collectively as UFCW, in Cases 25-CA-25780-3, 25-CA-25780-4, and 25-CA-25780-5, all as amended, and upon a further charge filed by UFCW in Case 25-CB-8069-2, as amended, the Regional Director for Region 25, referred to below as the Regional Director, issued an order consolidating cases, consolidated complaint and notice of hearing on March 12, 1998¹ against Strack and Van Til Supermarkets d/b/a Town & Country Supermarkets and Ultra Foods, referred to below as

Strack, and against Independent Employees Union of Northwest Indiana, referred to below as IEU. Thereafter, on May 22, the Regional Director, upon a further charge filed by UFCW in Case 25-CB-8088, issued a second order consolidating cases, consolidated complaint and notice of hearing. Upon further charges filed by UFCW against Strack in Case 25-CA-26053-1, against C&T Properties in Case 25-CA-26053-2, and against IEU in Case 25-CB-8104, the Regional Director issued a third order consolidating cases, consolidated complaint and notice of hearing on July 31. Thereafter, on August 27, the Regional Director issued an amendment to consolidated complaint. Further, on September 8, I granted the Acting General Counsel's motion to further amend the consolidated complaint. Later, upon a charge and an amended charge filed by UFCW in Case 25-CA-26209 amended, the Regional Director issued a complaint and notice of hearing against Strack on October 6. On October 26, I granted the Acting General Counsel's motion to consolidate the complaint issued in Case 25-CA-26209 amended with the other cases recited in the third order consolidating cases, consolidated complaint and notice of hearing dated July 31.

The consolidated complaint, as finally constituted, alleges that Strack violated Section 8(a)(1) and (3) of the National Labor Relations Act, that C&T Properties violated Section 8(a)(1) of the Act, and that IEU violated Section 8 (b)(1)(A) and (2) of the Act. By their timely filed answers to the consolidated complaints, the Respondents Strack, C&T Properties, and IEU have denied these allegations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Strack, C&T, and IEU, following the closing of the hearing on December 9, as well as the supplemental briefs filed by the General Counsel and Strack on October 29, I make the following

FINDINGS OF FACT

I. JURISDICTION

Strack, a corporation, has offices and places of business in Merrillville, Portage, and Valparaiso, Indiana, where it engages in the retail sale of food and related products. During the 12 months ending on October 6, Strack derived revenues exceeding \$500,000 from its retail sales of food and related products. During the same period, Strack, in conducting its business at its Merrillville, Indiana store, purchased and received goods valued in excess of \$10,000 directly from points outside the State of Indiana. Strack admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all times material to these cases, Thomas E. Schmal and other partners d/b/a C&T Properties, with an office in Crown Point, Indiana, and place of business in Portage, Indiana, has been engaged in the business of owning and leasing commercial property located in Portage, Indiana. During the 12 months ending August 27, C&T Properties derived in excess of \$100,000 from its business operations, of which in excess of \$25,000 was derived from Strack. Strack, at its Portage, Indiana facility, is engaged in the retail sale and distribution of food and related products and leases store space in C&T's Meadows

¹ All dates are in 1998 unless otherwise indicated.

Shopping Center located in Portage, Indiana. Strack and C&T have admitted the foregoing data regarding C&T's business operations. However, they have denied that C&T is, and has been, an employer within the meaning of Section 2(2), (6), and (7) of the Act. However, I find from these facts that C&T is an employer within the meaning of Section 2(2), (6), and (7) of the Act. *Mistletoe Operating Co.*, 122 NLRB 1534, 1536 (1959). See also *Management Training Corp.*, 317 NLRB 1355, 1358 (1995).

Strack, C&T, and IEU admit that Local 700, Local 881 and IEU, respectively, are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

Strack operates 10 retail stores in Indiana and Illinois. Of these, six are called "warehouse stores." Two warehouse stores are located in Illinois and four are located in Indiana. The 10 stores have a total of 1800 to 2000 employees. At all times material to these cases, Strack has recognized and bargained with Local 881 as the exclusive collective-bargaining representative of the employees at seven of its stores. Since 1993, when it acquired the two Town & Country stores, located, respectively, at Portage and Valparaiso, Indiana, and its Ultra Foods store at Merrillville, Indiana, Strack has recognized and bargained with IEU as the exclusive collective-bargaining representative of the employees in these three stores, which are involved in the captioned cases. At all times material to these cases, Strack has leased from C&T space at the Meadows Shopping Center, which its Portage store occupies. IEU has represented the employees at Strack's Portage, Valparaiso and Merrillville stores for at least 30 years.

John Rongers, a meatcutter at the Merrillville store is, and has been, at all times material to this case, president of IEU. The other officers on IEU's executive board are Vice President Hector Arroyo, Treasurer John Malyj, and Secretary Cindy Erakovich. All three worked at the Merrillville store. In addition, IEU had an elected trustee at each of the three stores it represents. Annette Peters, the alleged discriminatee in these cases, was trustee for the Portage store, until Strack terminated her on January 10.

IEU and Strack were parties to a collective-bargaining agreement, effective from February 11, 1994, until February 10, covering the store employees at Strack's Portage, Valparaiso, and Merrillville stores. In early December 1997, IEU and Strack began negotiations for a new agreement covering the same bargaining unit. On December 22, 1997, the bargaining unit employees ratified the new agreement, effective from that date until February 10, 2001.

In early November 1997, UFCW through Locals 700, and 881 began a campaign to organize the store employees at Strack's Portage, Valparaiso, and Merrillville stores. The Locals obtained enough signed authorization cards to support a petition for a representation election covering the three stores. On December 17, 1997, the two locals filed a petition in Case 25-RC-9742 seeking an election in the three-store bargaining unit. Two days later Locals 700, 881 and UFCW Local 542

filed an amended petition in Case 25-RC-9742 seeking an election in the same unit. To date, the Regional Director has not held that election.

The issues raised in these cases regarding Strack's conduct following the inception of UFCW's organizing campaign are whether it violated the Act as follows:

1. Section 8(a)(1),² by:

- a. Interrogating employees about their union membership, activities, and sympathies.
 - b. Threatening employees with loss of hours if the selected UFCW as their bargaining representative.
 - c. Engaging in surveillance of employees engaged in union activity.
 - d. Threatening employees with arrest because they engaged in lawful handbilling and picketing on behalf of UFCW.
 - e. Causing the removal of employees engaged in lawful picketing and handbilling on behalf of UFCW at Strack facilities.
 - f. Causing the arrest of employee Jeff Kimbrough because he was engaged in lawful handbilling and picketing at a Strack facility.
- #### 2. Section 8(a)(3)³ and (1) by suspending, and later discharging, employee Annette Peters.

The issue raised in Case 25-CA-2605-3 is whether C&T violated Section 8(a)(1) of the Act by causing the removal of employees engaged in handbilling on behalf of UFCW at Strack's Portage facility.

Further issues raised in these cases are whether IEU violated the Act as follows:

1. Section 8(b)(1)(A)⁴ by:

- a. Telling Strack's employees that IEU would not represent employees who failed to pay dues to IEU.
- b. Informing Strack's employees that the Portage facility was a closed shop and that all employees must become members of IEU as a condition of their employment.
- c. Informing Strack's employees that IEU would not represent employees who would not authorize IEU to obtain dues checkoff.

² Sec. 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7."

In pertinent part, Sec. 7 of the Act declares: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

³ Sec. 8(a)(3) of the Act makes it an unfair labor practice for an employer:

"by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization. . . ."

⁴ In pertinent part, Sec. 8(b)(1)(A) provides: "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7."

2. Section 8(b)(1)(A) and 8(b)(2)⁵ by requesting that Strack discharge employee Annette Peters because she supported UFCW.

B. Interference, Restraint, and Coercion

In December 1997, on a workday, at Strack's Portage store, Grocery Manager Manny Gardiola encountered employee Gregg Scott in the store manager's office and asked him if he would be attending an IEU meeting that night. Scott replied, "Yes, I am." Gardiola went on, suggesting that Scott need to get as many people to that meeting as he could.⁶

In November 1997, Scott became aware of UFCW's campaign and at some time thereafter, he became active in it. However, the record does not show that Scott had become active prior to his encounter with Gardiola. Nor does the record show whether Gardiola knew or suspected that Scott was an AFCW supporter when he questioned him about the IEU meeting.

I find from Gardiola's testimony that in December 1997, he discussed an upcoming IEU meeting with Linda Novotny, a bargaining unit employee. Gardiola admitted that in this incident, he met Novotny at her workstation, the customer service booth at Strack's Portage store and asked her if she was going to an IEU ratification meeting. Gardiola regularly visited this office to ask the employees in this office how things were going and to see if there were any problems.

On December 12, 1997, at the Portage store, Annette Peters, IEU's trustee for that store, entered Store Manager Doug Smith's office to discuss an issue regarding the pay of some of the bargaining unit employees. In the course of the discussion, Smith asked Peters what she thought of UFCW.⁷ Peters did not

⁵ Sec. 8(b)(2) of the Act, in pertinent part makes it "an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to discriminate against an employee in violation of [Section 8(a)(3) of the Act]."

⁶ My findings of fact regarding Gardiola's interrogation of Scott are based upon Scott's testimony. Gardiola did not flatly deny having questioned Scott about his intention to attend an IEU meeting. Instead, on direct examination by Strack's counsel, who carefully guided him with leading questions, Gardiola denied remembering any conversation between him and Scott concerning union meetings. In contrast, Scott gave his testimony in a full and forthright manner. Although he was uncertain as to when in December 1997 Gardiola questioned him, he was certain that it occurred on one of two days, when an IEU evening meeting was scheduled. As Scott impressed me as being a frank witness endeavoring to provide his best recollection, I have credited his testimony regarding this interrogation.

⁷ Doug Smith testified that he remembered having a conversation with Peters sometime in December 1997 at the end of the dairy aisle at the Portage store. He provided a detailed account of her remarks about a wage issue regarding scanning department employees. However, in response to leading questions, he denied remembering asking her anything about UFCW or Local 881. Annette Peters gave her testimony about this encounter with Smith in a frank manner admitting on cross-examination that he might have asked her about UFCW rather than Local 881. However, her testimony indicated a firmer recollection of Smith asking about Local 881. In any event, as Local 881 is affiliated with UFCW, Smith's question touched on UFCW. As Smith did not flatly contradict Peters, and as she seemed a candid witness on this

disclose her sentiment. Instead, she told Smith that the Portage store employees would inform her of their choice of a union to represent them. The discussion continued on the wage issue.

Early on the morning of December 19, 1997, near a drinking fountain, in the vicinity of the Portage store's break room; Peters met Night Manager James Swisher, who after an exchange of greetings, asked her about her union sentiment. Swisher asked Peters for her opinion of UFCW. Peters replied that she did not know anything about UFCW, but that those employees who wanted that union to represent them would let Peters know.⁸

In the latter part of February, Jean Biggs, an employee at Strack's Valparaiso store, conversed with Store Manager Harold Howie, about how Strack was putting scanning department employees on registers, as cashiers. According to Biggs, this disposition of scanning department employees resulted in diminished working hours and a reduction in wages. During this conversation, Biggs complained to Howie about this loss of wages to scanning department employees. In response, Howie remarked that if "the other union" gets in, the employees might as well get accustomed to the reduction in hours because their hours would be cut anyway.⁹

On March 12, at Strack's Valparaiso store, employee Deborah McDaniels encountered Store Manager Howie in the store's courtesy booth. Another employee, Rita Olander was

aspect of the cases, I have credited her testimony regarding her encounter with Smith on December 12, 1997.

⁸ Swisher testified that he had a conversation with Peters early one morning. On direct examination, Swisher testified that he did not know when he had spoken to Peters. At that point in his testimony, he did not attempt to recall the date. Also, on direct, he did not seem anxious to provide much information as to what he said to Peters. However, when pressed on cross-examination, he admitted that the conversation occurred in December 1997. Swisher admitted on direct examination, and on cross-examination, that he asked Peters about "what was going on with the unions." He also denied asking her opinion of a union. On cross-examination, he testified that Peters told him that UFCW had enough signatures. Earlier, on direct examination he had denied that she had identified the union that had the signatures. On cross-examination, he also admitted that he was interested in finding out what was happening with the unions. Swisher further admitted that at the time of his exchange with Peters, he did not want another union to displace IUE as bargaining representative. In contrast with Swisher, who, at times, seemed to be a reluctant witness, Peters seemed to be a frank and forthright witness, who readily admitted uncertainty about whether Swisher and Smith mentioned Local 881 or UFCW in their remarks to her. I have credited her version of her encounter with Swisher and also find that her best recollection was that Swisher mentioned UFCW.

⁹ In responses to carefully worded leading questions on direct examination by Strack's counsel, Howie denied having any memory of a specific conversation with Biggs about the breakdown of her hours between scanning and cashiering. In response to a leading question about whether he remembered having a conversation with Biggs about getting used to reduced hours because of a union, Howie answered: "No, I don't sir."

I have credited Biggs' testimony regarding her encounter with Howie in late February. I did so in light of her straightforward demeanor as she testified. I also noted that at the time she was testifying she was a Strack employee. See *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961).

also present in the booth. Olander warned Howie that some of his cashiers would be unhappy about having assigned hours on Sunday. Howie replied that if the UFCW came in, no one would work more than 30 hours per week. McDaniels argued that the number of working hours depended upon the outcome of negotiations. Howie gave a "sarcastic, smirkey smile" in McDaniels' direction. At the time of this conversation, the average weekly hours for cashiers at the Valparaiso store were 35 to 37.¹⁰

The General Counsel urges me to find that Strack's interrogation of its employees, as set forth above, violated Section 8(a)(1) of the Act.¹¹ Strack argues for rejection of the General Counsel's position. In determining whether those instances of interrogation violated Section 8(a)(1) of the Act, I have examined the surrounding circumstances, as required by Board policy. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006, 1007-1009 (9th Cir. 1985). Accord: *Pepsi Cola Bottling Co.*, 301 NLRB 1008, 1011 (1991).

In each of the episodes of interrogation, the supervisor involved raised the topic of union activity in a coercive atmosphere. None of the supervisors involved in the questioning communicated the purpose of his question to the questioned employee. Also, in each instance, the supervisor did not assure the questioned employee that Strack was neutral or that Strack would not punish employees for supporting UFCW or IEU. Indeed, Guardioli urged employee Scott to recruit other employees to attend the IEU ratification meeting. Thus, did Guardioli suggest that Strack favored IEU against UFCW. Both Store Manager Doug Smith and Night Manager Swisher asked Peters about her attitude toward UFCW. That these inquiries were coercive was evidenced by Peters' evasive answers. Again, neither Smith nor Swisher advised Peters of the purpose of their respective questions.

An important factor in my assessment of Strack's interrogation in these cases was the abundant evidence of its hostility toward UFCW, as reflected by Strack's unfair labor practices that followed. Among those were Store Manager Howie's warnings that if UFCW succeeded in its effort, the employees at Strack's Valparaiso store would suffer a loss of working time. Those warnings suggested that the bargaining unit employees would suffer reductions in wages automatically, if the UFCW achieved representative status at Strack's Valparaiso store. Howie did not explain how such a loss would be beyond Strack's control. I find, therefore, that Howie's warnings consi-

¹⁰ Howie, by his response to a leading question on direct examination, denied remembering that he had voiced the warning attributed to him by McDaniels' testimony. In contrast, McDaniels, who was a Strack employee when she testified in this proceeding, seemed to be providing her recollection in a frank manner. Accordingly, I have credited McDaniels' testimony regarding her encounter with Howie on March 12.

¹¹ I based my findings regarding the interrogation of Novotny upon Guardioli's testimony. Although the consolidated complaint did not allege this incident as a violation of the Act, Strack had ample opportunity to litigate this incident. Board policy requires that I determine whether this interrogation violated the Act. *Central Soya of Canton, Inc.*, 180 NLRB 546, 556 (1970).

tuted a threat of economic reprisals if the Valparaiso employees selected UFCW as their collective-bargaining representative. *Monfort of Colorado*, 298 NLRB 73, 85 (1990), enfd. in pertinent part 965 F.2d 1538 (10th Cir. 1992). By these threats, I find that Strack violated Section 8(a)(1) of the Act. *Peabody Coal Co. v. NLRB*, 725 F.2d 357, 362-363 (6th Cir. 1984).

As found below, Strack's hostility toward UFCW surfaced when, at IEU's behest, it suspended Peters from her employment on January 2, and then, on January 10, discharged her, all in violation of Section 8(a)(3) and (1) of the Act. This hostility persisted through the spring and summer when as found below, Strack committed other violations of Section 8(a)(1) of the Act in its opposition to UFCW's organizing campaign.

I have not overlooked Strack's written neutrality agreement with AFCW, dated March 5. In that accord Strack agreed to give AFCW access to its stores for solicitation and distribution, and to present UFCW with an employee list with addresses covering the Portage, Valparaiso, and Merrillville stores. The agreement included Strack's expression of neutrality toward UFCW and IEU. Strack also agreed to refrain from interrogating employees about their support for UFCW. Finally, Strack agreed to hold a meeting at each of the three stores, with UFCW and IEU present and tell the employees of its neutrality in the pending representation election. However, this agreement came into being more than 2 months after the interrogation recited above, and about 2 months after Strack had unlawfully terminated Peters at the insistence of IEU. I also note that Howie's unlawful threats, occurred, respectively, in late February and on March 12. In any event, Strack repudiated the agreement, in a letter to UFCW dated May 22. Thus, I find that the agreement of March 5 did not significantly dilute the hostility that Strack's management exhibited toward UFCW when it committed the unfair labor practices set forth in this decision. Accordingly, I find that the interrogation by Guardioli, Smith, and Swisher, as set forth above, was coercive, and therefore violated Section 8(a)(1) of the Act.

C. The Alleged Discrimination Against Annette Peters

1. The facts

At the time of her discharge, on January 10, Annette Peters had worked for Strack and its predecessors at the Portage store for 13-1/2 years. Peters was a deli clerk in that store for the last 5 years of her employment there. Deli Manager Roberta Koznicki was her immediate supervisor at the time of Peters' discharge. Doug Smith managed the Portage store for the 8 years preceding Peters' discharge.

Peters had been an active member of IEU for 13-1/2 years, at the time of her discharge. From her election in April 1997, until her discharge, Peters served as IEU's trustee for the Portage store. As a store trustee, Peters processed grievances arising under IEU's contract with Strack on behalf of the unit employees working at the Portage store. IEU paid its store trustees \$125 per month plus \$10 per meeting for attending two executive committee meetings each month.

In late November 1997, at a meeting of IEU's executive committee, President John Rongers announced that UFCW's Local 700 was seeking to represent Strack's Valparaiso store. Following a discussion, Peters, President John Rongers, and

other members of IEU's executive committee attended a UFCW meeting on December 9, 1997. Following the meeting, Peters remained to chat with UFCW representatives. Peters also signed a card authorizing UFCW to represent her for the purpose of collective bargaining.

From December 9, 1997, until on or about December 17, 1997, Peters assisted UFCW's organizing campaign. She was involved in the solicitation of four or five signed UFCW authorization cards. On December 9, 1997, she solicited a signed authorization card for UFCW from employee Raymond M. Larson.¹²

By December 16, 1997, IEU President John Rongers had received word from employee Donna Martinez that Peters was holding UFCW authorization cards. I find from Martinez's undenied testimony, that she asked Rongers whether an elected IEU official should be involved with the UFCW cards. Martinez had been IEU's Portage store trustee for 5 years ending in March 1997, when Peters ran against her and won an election for the office.¹³ I also find from Martinez's testimony that he answered: "Absolutely not." However, Rongers assured Martinez that he would not press charges against Peters.

In early December 1997, Strack and IEU began negotiations for a new collective-bargaining agreement covering Strack's stores at Merrillville, Portage, and Valparaiso. The existing agreement was to expire on February 11. IEU's negotiating committee included its executive board and two additional employees from each of the three stores. There were negotiating meetings between Strack and IEU on December 11 and 16, 1997. At the second meeting, the parties reached an agreement.

At the negotiations on December 11, 1997, IEU President Rongers explained to Strack's President Larry Raab that UFCW's Local 881 was seeking to represent the bargaining unit employees and that he, Rongers, wanted to impede that campaign by presenting the unit employees with a collective-bargaining agreement as soon as possible. Raab said he would do his best to assist in that process.¹⁴

One contract provision caused disagreement among the membership of IEU's negotiating committee. Peters and Portage employee Jeff Kimbrough voiced disapproval of Strack's Sunday premium pay proposal. However, they were outvoted and the IEU negotiating committee voted to recommend ratification by the unit employees of that proposal along with the rest of the proposed contract.

On December 17, 1997, UFCW Locals 700 and 881 filed a petition with the Regional Director for Region 25, in Case 25-RC-9742. By this petition, UFCW sought a representation election among the employees at Strack's Merrillville, Portage, and Valparaiso stores.

President Rongers scheduled ratification meetings for Sunday, December 21, 1997, at each of the three Strack stores cov-

ered under the proposed contract. In December 1997, the three stores did not operate on Sundays. Notices of the scheduled ratification meetings were posted on December 17 or 18, 1997, at the three stores. Employee Jeff Kimbrough, Peters and other employees wanted a single meeting of all the bargaining unit employees. They discussed their view among themselves. Peters and Kimbrough decided to convey this sentiment to Rongers.

Peters repeatedly attempted, unsuccessfully, to reach Rongers by telephone on December 18, 1997. Peters telephoned Rongers' home at least seven times and IEU Secretary Cindy Erakovich's home once. Peters' purpose was to discuss the ratification process, a wage issue concerning the Scanning Department and a wage issue regarding the night shift. She left at least one taped, angry sounding message on Rongers' telephone regarding the ratification. Rongers heard his voice mail and understood that Peters wanted a single ratification meeting and that she was angry.

At about 10 a.m., on December 19, 1997, Peters asked her supervisor's permission to phone Rongers at his workplace in Strack's Merrillville store. Jim Powell answered when Peters' call came through on that morning and announced it to Rongers. After Rongers said "hello," Peters said, "John, next time I see you I'm going to kick your ass. I'm not afraid of you." Peters uttered this warning in a loud voice. Rongers asked her if she intended to kick his ass. Peters answered that she was not afraid of him. He asked her: "Who do you work for?"

Peters went on to complain that he had not returned her calls on the previous evening. Peters expressed opposition to Rongers' plan to have three separate ratification meetings. She also wanted to discuss some grievances with him. Peters asked Rongers if he wanted to see the names of the employees who were protesting his ratification process. He replied that there would be an executive committee meeting that evening, at which time they could discuss these matters.¹⁵ Peters said she would be at the meeting. However, later, IEU Secretary Cindy Erakovich telephoned Peters to report that the meeting had been cancelled.

On December 20, 1997, employee Donna Martinez posted at the Portage store IEU flyers announcing that there would be a single ratification meeting at 6:30 p.m., on December 22, 1997, at the American Legion's hall in Hobart, Indiana. Such posting

¹² My findings of fact regarding Peters' solicitation of a signed card from Larson are based upon his uncontradicted testimony. Peters testified that she did not recall having asked Larson to sign a card for UFCW.

¹³ My findings regarding Martinez's trusteeship are based upon her uncontradicted testimony.

¹⁴ My findings regarding Rongers' and Raab's remarks on December 11, 1997, are based upon Peters' uncontradicted testimony.

¹⁵ Peters' version of her conversation with Rongers on December 19, 1997, varies substantially from his. I also noted that her testimony before me regarding her warning is substantially inconsistent with notes she prepared shortly after this encounter, where she admitted promising to kick Rongers' ass. Later, on January 2, in a written statement she gave to Strack, Peters asserted that when Rongers asked her what union she was working for, she replied "I ought to kick you're ass for that statement." Of the two, Rongers appeared to be giving his best recollection of his telephone encounter with Peters on December 19. Peters' inconsistencies as to what she said to Rongers and regarding whether he laughed during their exchange, together with her occasionally evasive responses on cross-examination by IEU's counsel and Strack's counsel caused me to doubt the reliability of her testimony. Therefore, I have credited Rongers' version of their conversation of December 19, 1997.

was usually assigned to Trustee Peters. Martinez received this assignment from Cindy Erakovich. When Martinez asked about this change in procedure, Erakovich answered that she was not talking to Peters.¹⁶ Martinez quickly explained her role in the posting of the meeting notice to Peters, who complained that she was being locked out of her IEU duties.

Peters attended the IEU ratification meeting on the evening of December 22, 1997, at the American Legion hall, in Hobart, Indiana. However, before she arrived, Peters had consulted with a UFCW representative, Eddie Cauviant. She told him that IEU's leadership was bypassing her and taking away her functions as store trustee as shown by Donna Martinez's posting of the meeting notice. Peters complained that Rongers and Erakovich would not take her phone calls and that she "was being boxed out of any [IEU] activity." She also faxed a copy of a flyer she intended to distribute at the ratification meeting.

The IEU ratification meeting took place as scheduled. Approximately 75 employees, including Peters, attended. There were a table and seven chairs set up in the front of the meeting hall for IEU's executive committee. The general membership's chairs were arranged in rows facing the table and seven chairs. Peters chose to sit in the first row of chairs facing the table. She testified that her reason for not sitting with the executive committee was that she felt they had "boxed [her] out of her [IEU] position . . ." Prior to the start of the meeting, Peters distributed a flyer to her fellow IEU members. Earlier that day, she had faxed a copy of this flyer to Eddie Cauviant. The flyer, signed "Annette Peters," read as follows:

Wondering why I'm not sitting at the executive table tonight???

Here's just a FEW of the reasons . . .

I was elected to represent you to the best of my abilities.

Our president will not return messages, discuss our grievances, nor the secretary.

Our secretary has chosen to do union business with the former Trustee of the Portage store. The treasurer chooses her, too.

Our meetings are not being conducted under Robert's Rules of Order, as stated in our union by-laws.

I feel we have a voice . . . to make a choice. whatever it is that WE decide to choose.

The expiration of this contract is not until *February 11, 1998*. WHAT'S THE HURRY?? Let's have John answer that first!

UNION = U N I (you and I)

SOLIDARITY FOREVER!!

We need to talk we have the right to!

President Rongers called the meeting to order. Employee Jeff Kimbrough asked for and received the floor from Rongers. Kimbrough proposed a postponement of the meeting until the

¹⁶ I based my findings regarding the posting of the meeting notice upon Peters' and Martinez's testimony.

following Sunday. Peters expressed support for this proposal. The membership rejected Kimbrough's proposal.¹⁷

Peters asked for and received the floor from Rongers. Peters explained her flyer and why she was not sitting with the executive board. I find from the testimony of Strack employees Linda Phillips and Helen Aubin that Peters was loud and hostile in her tone and that a Hobart town policeman stationed in the hall cautioned Peters to calm down or else he would remove her from the meeting.

Peters had a tape recorder with her. Early in her remarks, the recorder fell to the floor and lost its batteries. Peters picked up the recorder and the batteries, handed them to Kimbrough, while asking him to put the recorder in working order. Kimbrough replaced the batteries and set the tape recorder on the table in front of Rongers.

Peters spoke about her efforts to contact Rongers on December 18, 1997. Peters said she would file unfair labor practice charges with the National Labor Relations Board against President Rongers and the executive board. In the course of her remarks, Peters confirmed that on December 19, 1997, in a phone conversation, that she had told Rongers she was going to kick his ass, and that she was not afraid of him. After Peters completed her remarks, the IEU membership ratified the collective-bargaining agreement.¹⁸

On the morning of Wednesday, December 24, 1997, Rongers complained to Merrillville Store Manager Nick Bella about Peters' threat of December 19, 1997. On Bella's instructions, Rongers prepared a written report of the incident and gave it to the store manager on that same day.¹⁹ I also find from Rongers' testimony that IEU's secretary, Cindy Erakovich, typed the report from his written draft. Rongers also admitted that he had Erakovich type his report as part of her official duties as secretary of IEU.

Rongers' testimony shows that at the time he filed his complaint against Peters, as IEU's President, he knew that Strack had discharged bargaining unit employees for making threats to employees or customers. I also find it likely that, as an employee, he, as did Peters, received an employee handbook showing that discharge was the prescribed punishment for such conduct. Indeed, Rongers admitted that, as IEU President, prior to his complaint against Peters, he had been involved in an instance where Strack had discharged employees for threats to employees.

¹⁷ My findings regarding Kimbrough's proposal at the meeting are based upon his testimony and IEU's minutes of the meeting.

¹⁸ I based my findings of Peters' remarks at the IEU meeting upon her testimony, the IEU's minutes of that meeting and the testimony of employee Aubin. I have also credited Kimbrough's testimony to the extent that it was corroborated by the IEU minutes. On cross-examination by IEU's counsel, Kimbrough, expressed uncertainty about his memory concerning whether he ever heard Peters threaten anyone. This testimony cast serious doubt upon his testimony on direct examination in which he corroborated Peters' version of her threat to Rongers. In footnote 13, above, I have rejected her testimony that she told him she "ought to kick" his ass.

¹⁹ I based my findings regarding Rongers' complaint to Bella upon Rongers' uncontradicted testimony.

Rongers' report stated that he was filing a complaint on his own behalf. The report told of the phone call he had received from "store trustee Annette Peters" at or about 10 a.m., on December 19, 1997. Ronger reported that "she started yelling at [him] about things." In the course of yelling at him, Rongers related that she said: "I'm not afraid of you, I will kick your ass when I see you." The report stated that Rongers answered: "Oh! You're [sic] going to kick my ass are you? & She repeated back to [him] yes I will kick your ass I am not afraid of you."

Later, John Mowery, head of Strack's loss prevention department, interviewed Rongers about the incident. Mowery investigated Ronger's complaint. In the process, Mowery interviewed several employees, who reported to him that at the IEU meeting, on December 22, Peters had confirmed that she had told Rongers that she was not afraid of him and that she would kick his ass when she saw him.²⁰

On January 2, Mowery and Lori Rossi, a loss prevention officer, interviewed Peters at Strack's Portage store. Store Manager Doug Smith was present toward the end of the interview. At Mowery's request, Peters provided him with a written statement providing her version of her encounter with Rongers on December 19, 1997. In her statement, Peters asserted that after Rongers had asked her what union she was working for, she got so irked that she said: "I ought to kick your ass for that statement." She also told Mowery that at the IEU meeting on December 22, 1997, she told the membership that in her last telephone conversation with Rongers, she had said that she would let the law do the ass kicking for her "in regard to the problems the union executive committee & union was [sic] facing at this time." Doug Smith read Peters' statement and suggested changes, which she made and initialed.²¹

Mowery asked Peters if she was aware of Strack's policy regarding threats to other employees. She said yes, she was. Mowery and Doug Smith left the room and returned soon. Smith told Peters that she was suspended until further notice. Smith based his decision to suspend Peters upon her written statement and Strack's policy reflected at page 7, section 10 of its employee handbook, which states:

10. Fighting, immoral acts, threats, or intimidation aimed at customers or employees will not be tolerated. Suspension or termination will result.

On January 8, Peters filed a grievance against Strack for suspending her. She submitted it to Manager Smith at the Portage store. By memorandum dated January 15, Smith denied this grievance.

In his report, dated January 5 to Strack, vice president Andrew Raab regarding the investigation of Peters' threat to Rongers, Mowery cited the quoted rule and punishment. Mowery also pointed out that Rongers was president of the Town & Country store union and that Peters was an IEU trustee

for the Portage store and represented that store. The report laid out the conflicting accounts of Rongers and Peters, respectively, regarding their conversation of December 19, 1997.

On January 8 or 9, Vice President Raab decided to discharge Peters. In making his decision, Raab relied on Mowery's report, Strack's policy regarding threats as stated in its employee handbook and Strack's records showing that it had discharged several employees for violating that policy.²² On January 10, Manager Doug Smith terminated Peters. He issued a written Employee Corrective Action Notice that stated, in substance, that the reason for her discharge was threatening Rongers by telling him that "she was going to kick his ass . . ."²³

On January 12, Peters filed a grievance against Strack for discharging her. She filed this grievance with Doug Smith, who issued a written denial of it on January 15. I find, from Peters' uncontradicted testimony, that IEU denied her subsequent request that it arbitrate her grievances.

Between January 5 and January 10, Rongers filed charges against Peters with IEU for violations of its by-laws growing out of her conduct toward him. A hearing on those charges was scheduled for January 13. However, IEU cancelled the hearing after her discharge on January 10.

Upon Strack's motion, I reopened the record in these cases, by my Order of October 7, 1999, and my Supplemental Order of October 8, 1999, to receive its Amended Answer to Third Amended Consolidated Complaint, an attached order from the U.S. District Court for the Northern District of Indiana, Hammond Division in Case No. 2:98-CV-91-RL-2, and the General Counsel's letter in response, dated October 5, 1999. In its amended answer, Strack added an affirmative defense of collateral estoppel in regard to the General Counsel's allegations that Strack suspended and discharged Peters in violation of Section 8(a)(3) and (1) of the Act. Thus, Strack seeks dismissal of those allegations on the ground that the U.S. District Court's dismissal of Peters' complaint against Strack arising from her discharge on January 10 precludes the relitigation of the same discharge in these proceedings. The General Counsel urges me to reject Strack's collateral estoppel argument.

Strack's amended answer to the third amended consolidated complaint recited the facts regarding the court proceedings. The District Court's decision supplemented and confirmed much of what Strack asserted in its amended answer.

Annette Peters filed a complaint pursuant to Section 301 of the Labor Management Relations Act against Strack and IEU. In her complaint, Peters alleged that Strack discharged her from her employment at the Portage store without just cause, in violation of the collective-bargaining agreement between Strack and IEU. She also alleged that IEU violated its duty of fair representation by failing to pursue her grievance against Strack seeking reinstatement and backpay.

On April 14, 1999, Strack and IEU, respectively, filed motions for summary judgment in the District Court. On Septem-

²⁰ My findings regarding Mowery's investigation are based upon the testimony of Rongers, Peters, and Doug Smith, and Mowery's report dated January 5.

²¹ My findings regarding Peters' meeting with Mowery and Smith are based upon Smith's and Peters' testimony, and Mowery's report dated January 5.

²² My findings regarding Vice President Raab's decision to discharge Peters are based upon Raab's uncontradicted testimony.

²³ My findings regarding the circumstances under which Peters learned of her discharge on January 10 are based upon her uncontradicted testimony.

ber 13, 1999, the District Court granted both motions and dismissed Peters' case with prejudice.

2. Analysis and conclusions

a. Collateral estoppel

Strack invokes the doctrine of collateral estoppel to preclude me from considering whether its suspension and discharge of Annette Peters violated Section 8(a)(3) and (1) of the Act. According to Strack, the district court's finding that she was lawfully discharged for cause disposes of the alleged violations of Section 8(a)(3) and (1) of the Act because that Court has concurrent jurisdiction with the National Labor Relations Board. The General Counsel urges me to reject Strack's position.

Where, as here, the General Counsel was not a party to the litigation before the District Court, the Board's policy, as stated in *Field Bridge Associates*, 306 NLRB 322 (1992), is as follows:

The Board adheres to the general rule that if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully. [Citation omitted.]

The Board's policy finds support in the teachings in *Amalgamated Utility Workers (C. I. O.) v. Consolidated Edison Co. of New York*, 309 U.S. 261, 264-265 (1940), where the Court held: "Congress declared that certain labor practices should be unfair, but it prescribed a particular method by which such practice should be ascertained and prevented. By the express terms of the Act, the Board was made the exclusive agency for that purpose." The Court was referring to Section 10(a) of the Act, which provides:

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has or may be established by agreement, code, law or otherwise.

After reviewing the procedures for processing unfair labor practice charges set out in Sections 10(b) and (c) of the Act, the Court held (309 U.S. at 265):

So far, it is apparent that Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief. The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.

See also *National Licorice Co. v. NLRB*, 309 U.S. 350, 362-364 (1940). "Thus, the Board, as a public agency asserting public rights should not be collaterally estopped by the resolution of private claims asserted by private parties." *Field Bridge Associates*, supra at 322. Accordingly, as the Board was not a

party to Peters' District Court proceedings, I decline to accord them a preclusive effect on the allegations that Strack violated Section 8(a)(3) and (1) of the Act by suspending and later discharging Peters.

b. Peters' suspension and discharge

The General Counsel contends that IEU violated Section 8(b)(2) and (1)(A) of the Act by causing Strack to suspend Peters on January 2, and thereafter, on January 10, to discharge her in violation of Section 8(a)(3) of the Act. IEU and Strack urge dismissal of these allegations on the ground that Strack's decisions to suspend and discharge Peters had nothing to do with her union activity but were grounded on her misconduct during her confrontation with Rongers on December 19, 1997. For the reasons set forth below, I find merit in the General Counsel's contentions regarding Peters' suspension and discharge.

Under Section 8(b)(2) and (1)(A) of the Act, it is an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against an employee in violation of Section 8(a)(3) of the Act. *Glaziers Local 558 (PPG Industries)*, 271 NLRB 583, 585-586 (1984). Under Board policy, if the record shows that Peters' union activity or expressions of sentiment toward IEU or its officers was a motivating factor in IEU's decision to seek punishment for her by Strack, that decision will be found unlawful unless IEU shows as an affirmative defense, that it would have sought punishment for her even in the absence of her union activity or expressions of sentiment toward IEU or its officers. *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB 1042, 1044 (1997). If the General Counsel shows IEU's unlawful motive, Strack's compliance with IEU's request violated Section 8(a)(3) and (1) of the Act. *Avon Roofing & Sheet Metal Co.*, 312 NLRB 499, 503-504 (1993).

As found above, Peters, together with Rongers and other members of IEU's executive board, attended a UFCW meeting on December 9, 1997. At the conclusion of the meeting Peters was the only member of the Board, who remained behind, visited with UFCW representatives, and signed an authorization card for that union. Thus began Peters' involvement with UFCW's effort to replace IEU as bargaining representative of Strack's Merrillville, Portage, and Valparaiso stores.

By December 16, 1997, Rongers had received word from IEU loyalist Donna Martinez that Peters was holding signature cards for UFCW. Rongers viewed Peters assistance to UFCW as conduct inconsistent with her position as an elected official of IEU. In substance, Rongers told Martinez that he would not press charges against Peters for such conduct.

Rongers' main concern at this point was to conclude negotiations with Strack and confront UFCW with an executed collective-bargaining agreement covering the three-store unit. Indeed, on December 11, 1997, Peters heard Rongers express his intention to keep UFCW "at bay" by bringing a contract to the IEU membership as soon as possible. Strack's vice president, Raab, agreed to do the best he could to accomplish that end.

Peters attended the contract negotiations as a member of IEU's executive board. She and Jeff Kimbrough openly opposed Strack's proposal regarding Sunday premium pay. The

majority of IEU's bargaining group approved the proposal as part of a contract package and recommended acceptance of the entire package by the membership.

Rongers scheduled separate ratification meetings for Sunday, December 21, 1997, at each of the three stores covered by the proposed contract. The IEU posted a notice announcing Rongers' intentions in this regard. Peters heard from employees, who insisted upon having a single unit-wide ratification meeting. She shared this view and on December 18, 1997, attempted to reach Rongers by telephone to urge him to have a single meeting and to discuss two wage issues. Peters telephoned Rongers' home phone no less than seven times on that day, and also tried to reach him at Secretary Erakovich's home telephone. Rongers did not respond to Peters' calls. She was annoyed by his failure to do so.

On December 19, 1997, Peters, with her supervisor's permission, telephoned Rongers at his place of employment, Strack's Merrillville store. She was angry about his failure to return her calls. As soon as he answered the phone, she threatened to kick his ass, the next time she saw him. She also said she was not afraid of him.

Rongers' response as he related it at the hearing suggested that he did not take her warning seriously. He asked: "You're going to kick my ass?" He then asked her: "Who do you work for?" Peters complained about the impending ratification meetings and wanted to discuss some grievances. Rongers asked her to defer her complaint and discussion of grievances until that evening's executive committee meeting. She said she would be at the meeting.

Rongers testified that on December 19, 1997, he believed that Peters was capable of inflicting harm upon him. He also gave testimony that: "She's had numerous problems with individuals, fights and stuff." However, when pressed, Rongers testified about only one physical encounter involving Peters. Rongers testified that she had engaged in a fight with another woman, former employee Judy Smith. Rongers is 5 feet 11 inches tall and weighs 178 lbs. Peters appears substantially shorter and lighter than Rongers.

On direct examination, Rongers asserted his fear was in part based upon his knowledge that Peters' husband was an avid hunter and that her father was also, and that there were guns in her home. On cross-examination, Rongers conceded that Peters' father was dead and thus no threat to Rongers. Rongers also conceded on cross-examination that he did not fear any harm from Peters' husband. From the foregoing, I find that Rongers went out of his way to show grounds for fearing bodily harm from Peters. I also note that IEU's counsel carefully lead Rongers in an effort to create a picture of genuine fear. These factors cast serious doubt on Rongers' testimony that he feared bodily harm at Peters' hands after their conversation on December 19, 1997.

Nor do I credit Rongers' testimony that he cancelled the executive board meeting scheduled for the evening of December 19, 1997, because he feared for himself and the Board. I find from his testimony, that her "complaining and yelling" on the phone annoyed him.

There were further circumstances, which fatally impaired Rongers' testimony regarding his fear of Peters. Thus, there

was no showing in his testimony or elsewhere in the record before me that Peters had physically attacked a man. Finally, Rongers did not immediately report Peters' threat to his superiors at Strack. Instead, he waited 5 days to do so. I also note that Rongers' complaint came 2 days after the ratification meeting, at which Peters openly challenged his leadership and the IEU.

In the interest of placating Peters and other IEU members, Rongers consolidated the three ratification meetings into one, to be held on December 22, 1997, at the Hobart, Indiana, American Legion Post. IEU issued a flyer advising its members of the consolidated meeting, its scheduled time, and its location. Normally, each store trustee receives a copy of an IEU flyer for posting in his or her store. Thus, under IEU's policy, on December 20, 1997, Secretary Cindy Erakovich should have sent a flyer announcing the Hobart meeting to Peters, at Strack's Portage store. Instead, she sent it to Donna Martinez for posting.

Martinez questioned Erakovich about this departure from normal procedure. Erakovich answered that she was not talking to Peters. Martinez explained her role in posting the flyer to Peters, telling her that Erakovich was the source of the flyer and had telephoned Martinez about it. Peters complained to Martinez about Rongers' failure to return her calls and that IEU's leadership was "locking [Peters] out."

Peters came to the IEU's ratification meeting armed with a flyer filled with hostility toward Rongers' and his administration of IEU. She distributed the flyer prior to her remarks to the membership. She showed her disaffection toward Rongers and the rest of the executive board by sitting with the membership rather than at the executive table. She joined with employee Jeff Kimbrough in urging postponement of the ratification meeting. Such a suggestion, if carried out, would have delayed Rongers' effort to fend off UFCW by having a new, executed collective-bargaining agreement with Strack.

Peters complained about Rongers' failure to return her calls on December 18, 1997. She also told the meeting about her telephone threat to kick Rongers' ass. Peters also threatened to file unfair labor charges against Rongers and the IEU with the Board.

Two days after the ratification meeting, Rongers, for the first time, complained to Strack that Peters had threatened him. The timing of Rongers' complaint strongly suggests that Peters' conduct at the meeting, and her flyer had provoked him.

I have no doubt that a copy of Peters' flyer found its way into Rongers' view. She passed it out openly at the beginning of the meeting. The flyer criticized Rongers' for not discussing grievances with her as store trustee, and for violating IEU's bylaws by ignoring Robert's Rules of Order. The flyer also criticized Secretary Erakovich for "doing union business with the former trustee of the Portage store." Here, Peters was complaining about Erakovich's refusal to deal with her about posting the notice of the postponed ratification meeting. Again, Peters touched on Rongers' effort to speed up the contract processing as a defensive tactic against UFCW. Her flyer pointed out that the current agreement was effective until February 11, and asked: "WHAT'S THE HURRY?" Here was a direct challenge to Rongers' leadership.

Rongers' willingness to exaggerate the impact of Peters' threat, even after she had withdrawn it, and the timing of his complaint to Strack strongly suggest that her flyer and her remarks at the ratification meeting of December 22, 1997, motivated his complaint to Strack 2 days later.

Beyond question, Peters, and Jeff Kimbrough, were engaged in dissident union activity, seeking to persuade fellow IEU members to examine more closely the proposed collective-bargaining agreement, to question Erakovich's treatment of an elected store trustee, and to challenge Rongers' effort to fend off UFCW and his conduct of union business and meetings. Thus, was she engaged in concerted activity protected by Section 7 of the Act. *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB 1042, 1044 (1997). Rongers' response was to seek punishment for Peters by reporting her threat to Strack.

That the record does not include a formal request from IEU to Strack seeking Peters' discharge does not excuse IEU from responsibility for causing Strack to suspend her and then discharge her as alleged. Where, as here, circumstances show a union request, an express demand is unnecessary to support a finding of a violation. *Avon Roofing & Sheet Metal Co.*, 312 NLRB 499, 503 (1993).

The record shows that Rongers made his complaint as president of IEU. Peters, acting as a trustee, made her threat to Rongers in his capacity as president of IEU. Thereafter, on December 24, 1997, Rongers, using his office as president of IEU, asked IEU Secretary Erakovich to type his complaint threat, as part of her official duties. Thus Rongers' complaint is attributable to IEU.

I find from Rongers' testimony that 14 years as President of IEU taught him that Strack discharged employees for making threats to employees or customers. As an employee, Rongers, as did Peters, received an employee handbook setting forth suspension or discharge as the choice of penalties for threats to employees or customers. On cross-examination, Rongers denied knowing how Strack would punish Peters when he filed his complaint. However, he did not deny that his experience as IEU President showed him the likelihood that upon learning of Peters' threat to "kick his ass" Strack would discharge her. Accordingly, I find that by Rongers' complaint, IEU was requesting Strack to discharge Peters for threatening him.

I find that the General Counsel has shown that Peters' challenge to Rongers' leadership was a motivating factor in IEU's decision to file a complaint against her for threatening him. Rongers' effort to placate Peters by having one ratification meeting instead of three did not satisfy her. Instead, she openly displayed her disaffection toward Rongers and his administration. The General Counsel's evidence strongly suggests that Rongers' quick resort to a complaint on December 24, 1997, seeking punishment for Peters was not provoked by her absurd threat against him, but by her conduct at the IEU meeting 2 days earlier. In the face of that showing, IEU could escape a finding of unlawful motive by showing that it would have made such a complaint even in the absence of the protected activity. *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

Here, IEU has not shown that it ever filed any other complaint with Strack against any other member of its bargaining unit. I find, therefore that IEU has not rebutted the General

Counsel's strong showing of unlawful motive. I further find that IEU seized upon Peters' tall talk of kicking Rongers' ass on December 19, 1997, as a pretext for getting rid of her because of her open opposition to President Rongers, his administration of IEU, and his hasty effort to obtain ratification of a collective-bargaining agreement with Strack. By this effort to punish Peters for her dissident union activity, IEU violated Section 8(b)(2) and (1) of the Act. *Paperworkers Local 1048*, 323 NLRB at 1044.

I also find that Strack, without regard to the fact that Peters' alleged misconduct occurred in the context of the internal affairs of IEU, acted on IEU's behest, to suspend her on January 2, and then discharge her on January 10. I further find that by this conduct Strack violated Section 8(a)(3) and (1) of the Act. *Avon Roofing*, 312 NLRB at 503-504. I also find that the record shows that Peters' threat to kick Rongers' ass, was made on the phone, in the course of heated remarks by an irate IEU trustee, whose capability made it unlikely that she could do so. These circumstances persuade me that Peters' misconduct on December 19, 1997 was not so egregious as to deprive her of the Act's protection. *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965); *Leasco, Inc.*, 289 NLRB 549 fn. 1 (1988); *Consumers Power Co.*, 282 NLRB 130, 131 (1986).

D. Restrictions and Other Interference with Handbilling and Picketing

1. The facts

In early February, Strack received a flyer announcing a rally in support of UFCW and Annette Peters. The flyer announced that the rally would take place at Strack's Ultra Foods store at Merrillville, Indiana, on February 7, from 11 a.m. until 1 p.m.²⁴

Strack's Vice President Andy Raab saw the flyer and contacted Strack's loss prevention department. I find from Raab's testimony that he instructed loss prevention to be at the rally from 11 a.m. until 1 p.m. Raab also testified that he told loss prevention to document any obstructions of customers trying to enter or leave the store and what the picketers and their signs were saying. Raab did not attend the rally. He received a written report of what happened at the rally from Loss Department Manager Darrell Roberts.

Annette Peters attended the rally at Merrillville from about noon until it ended. She observed Strack employees and other employees belonging to other unions at the meeting. The rally took place in the parking lot adjacent to Strack's Ultra Foods store. Darrell Roberts testified that there were 100 people in front of the store.²⁵ C. Lewis Piercey, organizing director for UFCW Local 700, who attended the rally, testified, in substance, that 100 to 175 people participated.

On February 7, Darrell Roberts arrived at the Merrillville store at 10 a.m. He came with instructions to call the police if there were any problems and to take pictures if the demonstra-

²⁴ My findings regarding Strack's receipt and treatment of the UFCW's notice of its February 7, meeting are based upon Vice-President Raab's uncontradicted testimony.

²⁵ The Merrillville police report received in evidence reported advice from a UFCW source that 50 to 75 of its members were present. Annette Peters testified that there were 200 people present at the rally.

tors were blocking the store's entrance and exit doors. Roberts also had instructions to write down the contents of the demonstrators' signs.

When the rally got underway, Roberts was inside the store, near the front, looking out. He saw a mass of people coming toward the store, chanting, screaming, and carrying signs inscribed with: "No peace, no justice." The crowd extended across the front of the store, standing shoulder to shoulder across both its entrance and its exit.

Roberts went out the exit door, forcing himself through the people. He asked them to move. They refused. Roberts went to the store entrance and asked the people to leave the doorway open so that others might enter the store. The demonstrators refused to move. They chanted: "No peace, no justice." One demonstrator had a bullhorn. Roberts forced his way between two men, who were standing shoulder to shoulder. Two large dogs accompanied the demonstrators.

Roberts reported his observations of the demonstration to the store manager, who called the police. The police officer in command at the rally site requested an emergency response team. However, the Merrillville deputy police chief saw no need for the additional police and the request was withdrawn. By 12:30 p.m., the police had persuaded the demonstrators to move to the curbside bordering the parking lot adjacent to the Ultra Foods store.

Raab's purpose in taking pictures at the rally was to have evidence to support a petition for an injunction. During the rally, loss prevention employees took 10 pictures of the scene. Two of the pictures show Roberts in the Ultra Foods store, following a picketer, who is carrying a sign inscribed "UFCW 700" and "NO JUSTICE NO PEACE." I find from Roberts' testimony that he followed the picketer and repeatedly asked him to leave the store. After circulating through the entire store, the picketer finally left.

None of the pictures show interference with persons actually trying to enter or exit the store. One of the pictures shows a group of demonstrators, with eight signs, standing to the right, looking toward the store entrance. A demonstrator is standing right in front of the entrance. The picture also shows a large dog held by a leash. One of the remaining pictures shows a demonstrator carrying a sign and standing in a doorway. Seven of the pictures show groups of demonstrators milling or standing in the parking lot or close to the front of the store.

I find from Darrell Roberts' testimony that during the rally, he wrote down the contents of 12 of the signs carried by UFCW supporters. I find from Annette Peters' clear and convincing testimony that she observed loss prevention personnel standing outside the Merrillville store writing down the messages on the UFCW's picket signs. I also find from Roberts' testimony that he did not take down any names at the rally on February 7.²⁶

²⁶ Peters testified with certainty that she saw Strack security personnel taking pictures at the rally on February 7. She thought the employee was named Kim. She could not recall anymore about who it was. However, Peters injected uncertainty into her testimony regarding whether they also took down names. Peters testified that "it looked like maybe names . . . of individuals" were written down. However, the uncertainty reflected in her tone as she testified about what looked like the taking of names cast serious doubt on the reliability of this testi-

I find from C. Lewis Piercey's uncontradicted testimony that he observed a Strack loss prevention employee named Lori apparently writing down names during the rally at Merrillville.

Roberts testified that he took pictures at the rally to show the crowding around the store's entrance and exit, the number of people in the roadway in front of the store, that some people could not get through, and that there were dogs near the entrance. He heard demonstrators making uncomplimentary remarks about products offered by the Ultra Foods store, and urging customers to shop across the street, at Wise Way. Roberts saw a female picketer intercept an elderly store customer, take her arm and talk to her. He went out of the store to encourage the customer to enter the store.

The Merrillville Police Department report filed by Sergeant Poling included Poling's observations of the rally. He reported that the demonstrators impeded vehicles in front of the store and the movement of customers trying to enter the store. He observed the intimidating effect on customers of the demonstrators and two large dogs with them near the store entrance.

Poling also reported a discussion with a UFCW representative, Chad C. Young. Poling told Young that the usual practice was to limit picketers or demonstrators to the easement near the entrance to the shopping plaza. Poling went on to advise Young that picketers or demonstrators were prohibited from impeding pedestrian or vehicular traffic. Poling reported his observations to his superior, Commander Petruch, who quickly spoke to Young. Petruch then alerted an emergency response team as a precaution.

It was Deputy Police Chief Guernsey, who, upon arriving at the rally, took charge of the situation. He saw "a large group of protesters milling, basically milling around the front of the store." Guernsey cancelled the ERT alert and persuaded Young to move the demonstration, including the picketing, to the shopping center's entrance. Thus ended the demonstration in front of the Ultra Foods store on February 7.²⁷

On or about May 18, Vice President Raab received a letter from UFCW announcing its intention to picket Strack's Indiana stores at some unspecified time. A newspaper article appeared on May 27, announcing that UFCW intended to picket Strack stores represented by IEU. The article specified Strack's stores at Merrillville, Portage, and Valparaiso.

Raab instructed the managers of the three stores to let their respective landlords know of the impending picketing and ask them if they wanted that to happen on their property. If not, Raab told the managers, the police would require a letter to that effect from each landlord before they would enter a store site to remove picketers. Raab also instructed loss prevention to take photographs of blockage by picketers, which Strack could use to obtain an injunction.²⁸

mony. In contrast, Roberts gave his testimony with certainty, and in a straightforward manner. Accordingly, I have credited his testimony where it differs from Peters' regarding Strack's conduct on February 7.

²⁷ My findings regarding Deputy Chief Guernsey's actions on February 7 are based upon his testimony and Sergeant Poling's report.

²⁸ My findings regarding Raab's receipt of information about UFCW's planned picketing at the three stores and his instructions to his managers are based upon his uncontradicted testimony.

By May 12, Douglas Smith, the manager of Strack's Portage store, believed that UFCW planned to picket his store on May 16. On May 11 or 12, Smith telephoned Thomas E. Schmal, the managing partner of C&T Properties. C&T Properties owns the Meadows Shopping Center, where Strack's supermarket has been a tenant at all times relevant to these cases. Smith asked Schmal to contact Portage's mayor to stop the expected picketing in front of Strack's Portage store. Schmal agreed to make the contact as soon as he received a written request for C&T's help.

Smith faxed a written request to Schmal on the same day. Smith's fax asked Schmal to contact Mayor Sam Maletta and advise him of the picketing expected to occur on May 16. Upon receipt of Smith's fax, Schmal contacted Mayor Maletta and asked that the Portage police intervene and prevent picketing by UFCW at Meadows Shopping Center.

Schmal followed up his telephoned request with a confirmation letter, dated May 13, to the mayor, advising that UFCW's picketing was expected to occur at Meadows on May 16.

UFCW did not picket Strack's store at Meadows on May 16. Smith advised Schmal that the picketing date was changed to May 23. On May 22, Schmal resent his letter to Mayor Maletta with a handwritten message about the new picketing date. Schmal made the call and sent the requests to Portage's mayor at Strack's request and in C&T's interest. Schmal had no further contact with Mayor Maletta regarding the UFCW's picketing. Nor did Schmal have any contact with the Portage police about the picketing.²⁹

At 11 a.m., on May 28, between 10 and 20 picketers arrived at the front of Strack's Town & Country Portage store and began picketing at its entrance and exit. Participants included Strack employees Annette Peters, Jeff Kimbrough, Deborah McDaniels, Erica Schwartz, P. J. Shippen, and UFCW staff members. I find from Kevon Carr's and Anthony Banks' testimony that Banks was an employee at the Portage store, when he picketed for UFCW at that store, on May 28. The picketers carried signs and distributed handbills.³⁰

The picket signs and handbills said that Town and Country was unfair to workers and asked the public not to shop at Town and Country/Ultra Foods. There were a series of handbills distributed by the employees and the UFCW staff members. Some carried messages claiming that Town & Country was unfair to its employees. Others complained that Strack controlled IEU and deprived its employees of the benefits of collective bargaining. Some of the handbills attacked IEU as a less than effective company union. However, all of the handbills asked the public not to shop at Town & Country. Some extended the request to Ultra Foods. The picket signs, and all

²⁹ My findings regarding Smith's contacts with Schmal are based upon their uncontradicted testimony. My findings regarding Schmal's efforts to contact Mayor Maletta are based upon Schmal's uncontradicted testimony.

³⁰ My findings regarding the picketing on May 28 are based upon C. Lewis Piercey's testimony. Of all the participants in the picketing, who testified, Piercey seemed to have the firmest recollection, and had been careful to take note of who participated in the picketing and the train of events on that day.

but one of the handbills, carried UFCW Local 700's endorsement. One handbill reported Annette Peters' discharge.

Within a few minutes after the picketers arrived on May 28, Store Manager Smith telephoned the Portage police and asked them to remove the picketers from the front of Strack's Portage store.³¹ The police complied with Smith's request within a few minutes. The police approached the picketers and asked them to move to the sidewalk near the street entrances to the shopping center. When C. Lewis Piercey protested that Federal law entitled the picketers to be in front of the store, the police threatened him and his colleagues with arrest. The picketers moved to the locations that the police had designated. The picketing continued until 7 p.m. that day. Thereafter, the picketing and handbilling continued at the entrances to the Meadows Shopping Center.

After about 10 minutes of picketing at an entrance to the Meadows Shopping Center, employees Jeff Kimbrough and Heather Bailey went back to the front of Strack's store and began handbilling. The Chief of Portage's police approached and asked Kimbrough what he was doing. Kimbrough replied that he was an employee and that as he and Bailey were employees, they were entitled to handbill at the front of the store. The Chief said he would check with the store manager and entered the store. He returned and reported that the store manager did not want the two employees handbilling in front of his store. The Chief ordered Kimbrough and Bailey back to the entrances. They complied.³²

Loss prevention Director John Mowery dispatched loss prevention Manager Darrell Roberts to the Portage store on May 28. Roberts began taking pictures of the picketing at 11:15 a.m. He had been instructed to take pictures if the picketers blocked the store entrance or exit, and write down the contents of the picket signs. Loss prevention employee Dennis DeLache also took some pictures of the picketers on May 28.

None of DeLache's or Roberts' pictures depicted blockage of the entrance or the exit of the Portage store. Instead, they show no more than three picketers strung out along the walkway in front of the store. Among those shown were employees Jeff Kimbrough, Debbie McDaniels Annette Peters, and Terry McCall.

Four of De Lache's and Roberts' pictures show four picketers at the Willow Creek entrance. I find from the uncontradicted testimony of Anthony Banks that the picketers in these pictures were walking in an area where automobiles would flow in and out of the shopping center. Banks also credibly testified, and I find from his testimony, that one of those pictures shows a picketer walking across the Willow Creek entrance. None of these pictures show blockage of traffic. Two pictures taken by Roberts each show one auto stopped near a picket, with no back up of traffic. Five more of their pictures show the Willow

³¹ Smith admitted that he telephoned the police and requested their assistance in removing the picketers from the front of Strack's portage store on May 28.

³² My findings regarding Kimbrough's confrontations with the Chief of Portage's police are based upon Kimbrough's uncontradicted testimony.

Creek entrance with five picketers and no obstruction of traffic.³³

Loss prevention employee Debbie Kirk and Lorrie Rossi took five pictures of the picketing at the Portage store in early June. These pictures show three picketers and one picket sign held up by one of them in the parking lot, near the Portage store. Rossi testified that she took three of the five pictures showing cars parked in the entrance to the shopping center. However, there is no testimony showing who parked those cars there, or who owned them. In one picture, Manager Douglas Smith is on his way across the lot to ask the picketers to move to the shopping center's entrances.³⁴

On May 28, after he had completed his duty at the Portage Town and Country store, Dennis DeLache wrote a report on the picketing which occurred there, covering the period from noon until 4 p.m. According to DeLache's report, he photographed and observed UFCW's picketers at the Willow Creek entrance. He asserted that the picketers obstructed the flow of traffic off of Willow Grove into the parking lot by stopping vehicles, which action caused a backup onto Willow Creek Road.

DeLache reported that his efforts to persuade the picketers to stand on either side of the driveway and to refrain from handing their flyers into customers' automobiles were ineffectual. DeLache's report shows that he called the Portage police twice and that they instructed the picketers to refrain from blocking the driveway and handing their flyers directly into the customers' vehicles.

Strack's surveillance of UFCW's picketing and handbilling continued after May 28. The parties stipulated that on May 30, and during the first 8 days of June, except for June 7, loss prevention Manager Darrel Roberts videotaped the picketing and handbilling at the Portage store. I find from Store Manager Smith's testimony that Roberts limited his video taping to UFCW's hired picketers and handbillers. I find from Kevin Carr's uncontradicted testimony that on or about June 5, loss prevention employee Lori Rossi came out of the Portage store and appeared to be taking one picture of the picketers.

Late on the morning of August 5, employees Kimbrough, Peters, and Bailey, and three UFCW staffers began to picket at the Portage store's entrance and exit doors. Shortly after the picketing began, three loss prevention employees came out of the store and looked on. One of the loss prevention employees began to take pictures of the picketers. Grocery Manager Manny Gardiola came out of the store and stood near the picketers. Soon a police car passed by the picketers and a policeman in the car told the picketers: "[J]ust don't block the entrance."

Ten or fifteen minutes later, three police cars pulled up to the picketing site. A police sergeant emerged from one of the cars and ordered the picketers to remove themselves to the entrances to the parking lot. Employee Kimbrough insisted on remaining in front of the store. The police arrested Kimbrough, hand-

cuffed him, and took him to the Portage Police Department's headquarters, where he was booked, fingerprinted and photographed. Kimbrough was charged with criminal trespass.

Kimbrough was scheduled to appear in a local court on September 16. However, at the time of the hearing in these cases, Kimbrough's court appearance had been postponed to November 12.

Strack's loss prevention employees took six pictures of the UFCW picketing on August 5. I find from Store Manager Smith's testimony that three of the pictures show Jeff Kimbrough standing near the store entrance with a picket sign. One of the pictures shows an unidentified person. I find that one of the six pictures shows two policemen escorting a handcuffed civilian through the parking lot near the Portage store. From the timing of this picture and Kimbrough's credited testimony, I have concluded that Kimbrough is the handcuffed civilian in this picture.

From June 25 until August 7, Strack maintained a record showing the dates and hours when its management observed picketing at the Portage store, and the number of picketers. Occasionally, the record showed the name of an employee observed picketing. I find from Store Manager Smith's testimony that Strack's list reported that employees Craig Scott, Heather Bailey, Tom Silver (shown as Silverman) and Jeff Stoke were observed picketing.

I find from Manager Douglas Smith's uncontradicted testimony that in early August, after Kimbrough's arrest, the Portage Police permitted UFCW handbilling in front of Strack's Portage store. I find from UFCW employee Kevin Carr's uncontradicted testimony that Strack permitted him and other UFCW picketers to handbill at the Portage store's entrance and exit. UFCW has been handbilling there since that time. However, Carr's testimony showed that on September 10, the Portage police intervened to thwart UFCW's attempt to picket at those locations.

I find from Manager Douglas Smith's uncontradicted testimony that on and after May 28, some of the picketers and handbillers at Portage were UFCW employees. I also find from the testimony of UFCW Local 700's employee Kevin Carr that on September 4, all six picketers at the Portage store were employees of Local 700. However, the record shows that Strack employees regularly participated in picketing and handbilling at the Meadows Shopping Center on and after May 28.

Strack's Portage store is located in C&T's Meadows Shopping Center, at the corner of Willow Creek Road and Central Avenue, in Portage. Strack shares the Meadows Shopping Center with other tenants including H & R Block, Family Dollar, Big R, Walgreen's, Blockbuster Video, and Dunkin Donuts. Strack's leasehold covers only the interior of its store. The store's entrance is at its west side of the storefront. Its exit is on the east side of the storefront. In the store's front, a cart room occupies a hall running between the entrance and the exit. There is no sidewalk running between the entrance and the exit. Instead there is a walkway consisting of a concrete pad. The shopping center has one driveway on Willow Creek Road and another on Central Avenue.

Strack introduced into evidence five written complaints that customers or employees filed during July and August regarding

³³ My findings regarding Roberts and De Lache's photography on May 28 are based upon Roberts' uncontradicted testimony.

³⁴ My findings regarding when these five pictures were taken and what they show are based upon Lori Rossi and Douglas Smith's testimony.

picket misconduct. None of these complaints identify the union affiliation of the malefactor. The misconduct included following an individual in a car. The remaining complaints involved a variety of annoyances. One complaint was about the picketers' practice of putting UFCW fliers into passing cars at the entrance to the Portage shopping center. Another, by employee Linda Phillips, dated August 8, complained that a picket threatened to put a flier on her windshield.

A report, dated August 28, said that the Portage store's courtesy booth had received several reports on that date that the picketers were using foul language and cursing at vehicles as they passed into or out of the shopping center. The report stated that the writer had complained to the Portage police, who instructed the offenders to stop their misconduct, and warned that if they repeated this misconduct, the police would return.

I received in evidence three incident reports concerning handbilling at the Portage store that Strack received from customers during September and October. One of these reports covered several dates in September and October and came from customer August C. Konie Sr. Konie complained that union affiliated persons repeatedly blocked his entry to the store and insisted that he take a leaflet. Konie did not identify the union or unions with which the offending persons were affiliated. Indeed, Konie mentioned neither UFCW, nor its Locals 700, nor 881.

The second report originated from Chuck Spiller. Spiller complained that on September 21, a nonunion person attempted to force him to take a flyer and told him where to shop. Spiller also reported an exchange of insults between him and the aggressor.

The third report, dated October 12, came from Portage customer Melanie Mitchell. Mitchell complained that a picket and a female companion blocked Mitchell's access to the entrance to the Portage store and were discourteous when she complained to them.

I find from Vice President Raab's testimony that at all times material to these cases, Strack has not had a written policy regarding solicitation or distribution at its stores. According to Portage Store Manager Douglas Smith's testimony, Strack permits the Boy Scouts, the Girls Scouts, churches, and school organizations to engage in solicitation or handbilling in parking lots and sidewalks adjacent to its stores. Smith also admitted that on occasion, Strack permits solicitation by such organizations inside a store, in a vestibule or cart hallway, or on the sidewalk near the store's entrance and exit.

Smith maintains a calendar for the solicitation and distribution, which he authorized, on Strack's behalf, at the Portage store. The calendar showed that a youth bowling group sold candy at that location on January 13. Smith's testimony showed that the bowling group conducted their sales inside the store's exit door on that date. On January 24, Indiana Softball sold raffle tickets in the cart room at Strack's Portage store. The Portage Firemen performed blood pressure screening inside the same store on January 30.

The record also shows that Strack permits solicitation on its store premises by commercial enterprises. Thus, on February 12 and 13, and again on June, 11 and 12, the *Portage Times*, a local newspaper solicited subscriptions for itself, in the Portage

store. On March 4, 5, and 6, American Telephone and Telegraph Company set up a solicitation site inside Strack's Portage store to pick up subscribers for its long distance telephone service. Smith testified that the Visiting Nurses were scheduled to set up a table on October 13, to offer flu shots to passersby for a reduced fee.

Smith also permits organizations to solicit outside his store at either its exit or its entrance. On March 14, a local girls' softball team sold poppies near an exit at the Portage store. Kevin Carr, a UFCW Local 700 organizer, took 10 pictures of non-union solicitation and signs at the front of the Portage store during late April, early May, September 19, and October 10. One picture shows a donation solicitor for the Knights of Columbus at the store's entrance. Two pictures show a Vidalia onion advertisement, sponsored by the Orak Shriners, hanging in front of a walkway near the store's exit. One man soliciting on behalf of the Orak Shriners is seated near the exit door. Two pictures show a woman in a yellow vest soliciting contributions at the store's entrance. Two pictures show tables line up in the walkway in front of the Portage store for the Portage Garden Club's 1-day flower and plant sale. Another picture, taken in September, shows a table in the store's front walkway during a flower and plant sale, with a Portage Garden Club sign on it.

During September and October, Kevin Carr took three pictures of nonunion solicitation at Strack's Valparaiso Town & Country market. In one of the pictures, a member of Kiwanas is selling peanuts as a fundraiser for that organization. The Kiwanas member is standing on what appears to be concrete sidewalk near an entrance to the store. A second photograph shows solicitors for the Sweet Adelines, at a table, conducting a garage sale, under a covered walkway, near the front of the store. The third picture shows a solicitor standing inside the entrance to the store, in the cart room, seeking donations.

Strack's unwritten policy regarding solicitation is uniformly applied at Portage, Merrillville and at Valparaiso. Harold W. Howie has been manager of Strack's Town & Country market at Valparaiso for the past 9 years, of which 5 years have been under Strack. Howie maintains a calendar of solicitations that he has authorized for charitable, community, religious, and business organizations and schools at the entrance side of the cart room, at the exit side of the cart room and in front of Strack's Valparaiso store.

His schedule for 1998 provides a glimpse of the application of Strack's policy. From February 2 until February 6, a local newspaper, the *Videt Times*, with Howie's permission, stationed representatives at the entrance to Strack's Valparaiso store, where they handed out copies of its paper and solicited subscriptions. Howie permitted American Telephone and Telegraph Company to seek subscribers to its long-distance service at the same location, on February 7 and 8. The *Videt Times* returned for further solicitation in the same location, on February 21 and 22, and again, from June 6 until June 10, and from July 6 until July 11. In early March, AT&T returned for more solicitation at the same location, in the front of Howie's store. On June 22, the Chicago Tribune solicited subscriptions for its newspaper at the entrance side of the cartroom.

On other occasions Howie authorized other organizations to use his store for solicitation campaigns. From February 9 until February 14, Howie permitted the *Post Tribune*, a local newspaper, to solicit subscriptions and distribute copies of its paper at the entrance to the cart room in the front of the Valparaiso store. In March, a charitable organization, the Exchange Club set up a yard sale, on the sidewalk, underneath the store's awning, to the left of its entrance. The United Christian Church stationed solicitors at the exit side of the cart room on March 28 to raise money for a local food pantry. The Fair Haven School solicited contributions, at the same location, to its fund on April 1 and April 13. On May 20 and 21, the American Legion stationed solicitors at the store entrance to raise money.

Strack has permitted some organizations to bag groceries for customers as a fundraising activity. The Civil Air Patrol, the Quarterback Club and a girl's baseball team have engaged in this activity at the Valparaiso store.

In early June, following instructions from Vice President Raab, Harold W. Howie, manager of Strack's Town & Country market at Valparaiso, contacted the local police and advised them that he expected picketing at his store. He also told the Valparaiso police that he intended to ask for their help when it occurred.

Howie also carried out another instruction from Raab by contacting Mary Flowers, owner of the property at his store's location. Howie asked for Flowers' attitude toward picketing on her property. She requested that he draft a letter expressing her sentiment, for her signature. Howie soon complied with Flowers' request, and she signed the letter. Howie kept the letter at his store and sent a copy to Raab. Strack neither showed, nor provided, a copy of Flowers' letter to the Valparaiso police.

Strack's Valparaiso Town & Country market is the only store located on Mary Flowers' lot abutting Calumet Avenue in Valparaiso. There is an asphalt-surfaced parking lot in front of the store. Two driveways, each with space for two-way traffic, serve the parking lot. Adjacent to the asphalt parking lot is a smaller area with a gravel and grass surface that Strack owns. Strack's lease covers the store and the paved parking lot.

The UFCW began picketing Strack's Valparaiso store at 11 a.m. on July 9. The nine picketers stationed themselves in front of the store. Most of the picketers were near the store's entrance. Two or three were picketing between the entrance and the exit. When the picketing began, all nine were UFCW employees. The picketers wore or carried signs with the message: "Do not shop Town & Country, unfair to employees." They also distributed handbills discussing the UFCW's views regarding Strack's relationship with IEU and asking that the reader not shop at Strack's stores.

After about 25 minutes, Assistant Store Manager Bill Nolan came out of the store and approached the picketers. He warned them that they were not allowed to be in front of the store because it was private property. One of the picketers, Alberta Jordan-Rigsby insisted that they could remain there as long as they did not interfere with the egress and ingress of customers. Nolan repeated his admonition and warned that he would call the police. Rigsby repeated her earlier insistence that she and her colleagues could remain at the front of the store so long as

they did not interfere with customers. Nolan returned to the store.³⁵ In his testimony, Manager Howie admitted that Assistant Manager Nolan called the Valparaiso police.

Approximately 15 minutes after Nolan had returned to the store, a Valparaiso policeman pulled up to the picketers. He informed the UFCW picketers that they were trespassing. When Rigsby began to argue with the policeman, he gave the picketers 5 minutes to remove themselves to the Calumet Avenue easement, near the street entrance to the shopping center.³⁶ After the officer arrived, Nolan came out of the store and stood some distance from the picketers. The picketers withdrew to the Calumet Avenue entrance to the parking lot.

The UFCW picketing continued after July 9 and was in progress at the time of the hearing in these cases. I find from Rigsby's testimony, that she participated in the handbilling and picketing at the Valparaiso Town and Country location until July 21. I also find from Rigsby's uncontradicted testimony, that during the period of her participation, she observed Strack employees Julie Peterson and Debbie McDaniels on UFCW's Valparaiso picket line.

I find from employee McDaniels' uncontradicted testimony that she began picketing for UFCW at Valparaiso on or about July 12. She picketed at Valparaiso at least 3 days per week. On July 12, while picketing, McDaniels noticed some loss prevention personnel taking pictures of the picketers. McDaniels joined the UFCW picket line at about 3:30 p.m. that day. At this point, she noticed four Town & Country employees picketing for IEU. McDaniels saw loss prevention employee Debbie Kirk photographing the four, as they picketed at the front entrance of the parking lot, on Calumet Avenue.

During the picketing by UFCW at Strack's Valparaiso store and some counterpicketing by IEU at the same location, Manager Howie recorded his observations on six pages. Howie made these notes on July 9, 12, 13, and 29. Howie's written observations included the names of Strack employees, including Debbie McDaniels, and Julie Peterson, whom he noted were picketing in support of UFCW. In addition, Howie's notes recorded his observations that employees Rhonda, Linda, Cheryl, Sherrie and Tamara were counterpicketing for IEU. Howie's notes do not show any surnames for the counterpicketers. I find from Howie's testimony that IEU counterpicketers appeared at the Valparaiso store on July 12 and 13.

Strack's loss prevention employees took six photographs at the Valparaiso store on July 12. I find from Manager Howie's testimony that they show Valparaiso store employees Linda Philips, Tamara Hoptowit, and Sherrie Turpin. Four of the pictures clearly show anti-UFCW signs and the counterpicketers identified by Howie in his testimony about the pictures.

In July and August, Manager Howie made notes of complaints and incidents involving the picketers at Strack's Valparaiso store. On July 7, Howie recorded a complaint from Mr. Fredricks about a picket who poked his head into Fredricks' car and handed him a flyer. On July 10, Howie recorded a com-

³⁵ My findings regarding Nolan's exchange with Rigsby on July 9 are based upon Rigsby's uncontradicted testimony.

³⁶ My findings regarding the picketers' encounter with the Valparaiso police are based upon Rigsby's uncontradicted testimony.

plaint from Mr. Froeber that a picketer, presumably from UFCW, attempted to hand him a flyer that he did not want. Howie made a note of a complaint on July 30 by employee Alice Carroll that a picketer followed her in a blue Camero. He also noted that on July 31, he and two loss prevention employees asked picketers to remove their cars from the Valparaiso store's parking lot."

In his notes dated August 6, Howie reported that he called the police to have picketers' cars removed from the same parking lot. Also, in his August 6 notes, Howie wrote: "Jeff Kimbrough was on the picket line in the afternoon.

In another complaint, employee Linda Phillips reported that a picketer had threatened to put one of their signs on her car. The date of the alleged offense was August 8. In view of the date of this incident, I find that Phillips is reporting misconduct by a UFCW picketer.

On August 28, Howie reported that the picketers had used "foul language" and "cursing at vehicles when passing in and out of the lot." Howie's report stated that he called the police, who instructed the picketers to refrain from such conduct.

An undated report by Howie asserts that employee Joan Shaeffer complained that picketers were blocking the entrance to the parking lot at the Valparaiso store. This report does not identify the affiliation of the picketers.

2. Analysis and conclusions

The amended complaint in these cases alleges that Strack violated Section 8(a)(1) of the Act by threatening employees with arrest for handbilling and picketing at its Valparaiso Town & Country store for UFCW, causing the arrest of employee Jeff Kimbrough for engaging in handbilling and picketing for UFCW at the Portage Town & Country store; and, by causing the removal of employees engaged in lawful picketing and handbilling at the entrance and exit of the Portage Town & Country store. The General Counsel argues that Strack's treatment of employees picketing and handbilling on UFCW's behalf was discriminatory because Strack permitted charitable and commercial groups to solicit freely for their respective purposes inside and outside those same stores.

Strack, in its post-hearing brief, contends that unlike the charitable and commercial groups, the employees supporting UFCW were encouraging Strack customers to shop elsewhere. According to Strack's brief, the picketing and handbilling of UFCW's supporters was not entitled to the protection of Section 7 of the Act because they were seeking to harm Strack's business. However, current Board policy requires that I reject Strack's defense. In *Riesbeck Food Markets*, 315 NLRB 940, 943 (1994), enfd. denied 91 F.3d 132 (4th Cir. 1996) (unpublished decision), the Board found that the employer's practice, in that case, of reviewing and evaluating each message sought to be disseminated, and granting access (to its retail store premises) only if in its judgment the solicitation did not adversely affect its business, was unlawfully discriminatory vis-à-vis union solicitation of customers. Consequently, the Board found the employer's policy was "discriminatory on its face and in its application." Id. The Board went on to hold that "the Respondent's denial of access to the Union to picket and handbill near the customer entrances to two of its stores constituted unlawful

disparate treatment of union activities in violation of Section 8(a)(1)." Id. (Fn. omitted.)

Here, Strack, permitted others to solicit inside, and in front of, Town & Country stores at Portage and Valparaiso in 1998, before and after the July and August dates, when it caused the police to remove UFCW picketers and handbillers from the fronts of those stores and caused Jeff Kimbrough's arrest for picketing in front of the Portage store. Strack's liberal attitude toward solicitations by newspapers, AT&T, charitable organizations and other community causes is shown by the solicitation calendars which those stores, respectively, maintained for that year. The frequency and broad spectrum of permitted activities far exceeds the "tolerance of isolated beneficent solicitation" that the Board might regard as narrow exceptions to an otherwise valid, nondiscriminatory no-solicitation policy. See *Hammary Mfg. Corp.*, 265 NLRB 57 fn. 4 (1982). Accordingly, I find that the solicitation by the various organizations listed on Strack's 1998 solicitation calendars was sufficient to show disparate treatment.

The Act does not permit Strack to discriminate against UFCW's request that customers refrain from shopping at the Portage and Valparaiso stores as part of an organizing campaign. UFCW's picketing and handbilling, which carried that request, was conduct protected by Section 7 of the Act. *Riesbeck Food Markets*, 315 NLRB, at 942. By threatening its employee engaged in picketing and handbillings with arrest for engaging in such conduct at its Valparaiso store, and by prohibiting this protected conduct, near its Portage and Valparaiso stores and causing city police to remove its employees from the front of those stores, while at the same time allowing substantial business, civic, and charitable promotional activity near those stores, Strack violated Section 8(a)(1) of the Act. I also find that Strack violated Section 8(a)(1) of the Act by summoning the police to its Portage store on August 5 to have employee Jeff Kimbrough arrested. *Sandusky Mall Co.*, 329 NLRB 618 622 (1999).

I also find C&T Properties acted at Strack's request by telephoning, and writing a letter to Portage's Mayor Maletta to seek police intervention to prevent UFCW from picketing at Meadows Shopping Center. C&T's action rendered it Strack's agent within the meaning of Section 2(2) and (13) of the Act,³⁷ in the latter's unlawful effort to interfere with its employees' right under Section 7 to assist UFCW's organizing campaign at the Portage store. See *Blankenship and Associates, Inc.*, 999 F.2d 248, 249-250 (7th Cir. 1993). I find, therefore, that by asking Portage's mayor to prevent UFCW from picketing at the Meadows Shopping Center, C&T violated Section 8(a)(1) of the Act.

The Board has long held that "photographing [protected concerted employee activity] in the mere belief that something might happen does not justify the employer's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in [such activity]." *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997). However, the Board has also recognized that the taking of pictures of nonemployees

³⁷ Sec. 2(2) of the Act defines "employer" to include "any person acting as an agent of an employer."

to document trespasser conduct to support a claim of trespass is a justification. *Ordman's Park & Shop*, 292 NLRB 953, 956 (1989).

In the instant case, the record shows that Strack, by its loss prevention staff, took pictures of its employees engaged in picketing and handbilling in support of UFCW's organizing campaign, at Merrillville, Portage and at Valparaiso. Further, Strack videotaped its employees while they were picketing and handbilling for UFCW at the Portage Town & Country site. Strack took pictures of the IEU picketers at Valparaiso, while they were engaged in picketing against UFCW's efforts to organize.

In none of these incidents involving UFCW supporters did Strack show that it was seeking to use the pictures to document any misconduct other than possible blockage of an entrance to a store, or a driveway connecting a parking lot with an adjacent street. Loss prevention Manager Darrell Roberts admitted that he told a loss prevention employee to take pictures of the IEU picketers at Valparaiso on July 12 on the possibility of a confrontation between the rival factions. His stated reason was "so we could determine how many were there."

I find that Strack photographed and videotaped employees at its Merrillville Portage and Valparaiso stores with the expectation that something might happen that would warrant calling for police assistance. This purpose motivated Strack to photograph its employees picketing for UFCW and its employees picketing for IEU. Accordingly, I find that by photographing and videotaping its employee while they were engaged in picketing and handbilling protected by Section 7 of the Act, Strack violated Section 8(a)(1) of the Act. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993).

I find that on February 7, Strack employees, seeing Roberts standing outside Strack's Merrillville store, writing down the messages on the UFCW picket signs, without knowing what he was actually writing, would likely conclude that he was writing down the names of employees who were participating in the rally. Thus, I find that by this conduct, Roberts gave viewing employees the impression that he, on behalf of Strack, was engaged in surveillance of their protected union activity. By Roberts' conduct giving employees the impression that he was engaged in such surveillance, Strack impaired their right under Section 7 of the Act to engage in union activity and thereby violated Section 8(a)(1) of the Act. *Hospital San Lucas*, 319 NLRB 54, 59 (1995).

On the same date, a loss prevention employee appeared to be taking names down at the Merrillville rally. Here again, Strack at least gave the impression that it was engaging in surveillance of its employee's union activity and thereby violated Section 8(a)(1) of the Act.

I also find that Strack engaged in surveillance of its employees' protected union activity from June 25 until August 7 when it recorded the names of its employees observed picketing at its Portage store. Finally, I find that Strack engaged in surveillance of its employees' union activity on July 9, 12, 13, and 29, at its Valparaiso store. During those days, Manager Howie made notes showing the names of employees engaged in picketing and handbilling UFCW. On July 12 and 13, Howie made notes reflecting the names of Strack employees picketing for

IEU at Strack's Valparaiso store. On July 9, 12, 13, and 29, he made notes identifying Strack employees who were picketing at the same store for UFCW. Here again, Strack's conduct impaired its employees' right to engage in union activity, which Section 7 of the Act protects. Accordingly, I find that by this surveillance, Strack violated Section 8(a)(1) of the Act. *Ibid.*

*E. Alleged Independent Violations of
Section 8(b)(1)(A) by IEU*

During the first week of March, employee Ray Larson, who worked at Strack's Portage store from November 1997 until April, met IEU Trustee Dave Thomas in the store's breakroom. Thomas said he had something for Larson. Larson asked if Thomas would take care of a grievance Larson wanted to file. Thomas said: "[N]o, not at this time." Thomas then handed a four-part form to Larson. The form included a personal data file card, a bargaining authorization designating IEU as the signatory's exclusive collective-bargaining agent, a contract receipt, showing that the signatory had received a copy of the collective-bargaining agreement covering IEU's bargaining unit, and a dues-checkoff authorization in favor of IEU. Thomas told Larson that he needed to sign up for the IEU. Thomas said he would look into Larson's grievance.

Larson read the IEU form and noted the contract receipt. He asked Thomas for a copy of the IEU constitution and a copy of the IEU contract with Strack. Thomas said that neither of those documents was available, but were being printed. Larson said that once he received a copy of the contract, he would sign the form. Thomas replied that he would see what he could do about it and urged Larson to sign the form.

Larson and Thomas left the breakroom and continued their discussion next to the store's meat counter. Larson said he would sign the form if Thomas provided him with copies of the revisions of the old contract, a copy of the old contract and a copy of the IEU's constitution.

A few days later, at approximately 11 p.m., near the time-clock at the Portage store, Thomas approached Larson with the four-part IEU form seeking the latter's signature. Larson asked for the contract revisions. Thomas said they were not available. Larson insisted that he had to see them. Thomas returned to his quest. He said that Larson had to be a member of IEU to work at Strack's Portage store. Continuing, Thomas told Larson that the store was a closed shop and that Larson should watch his "butt" because if he, Larson, got into trouble, Thomas could do nothing about it. Larson asked why he would not be represented. Thomas replied, asking why he should represent Larson, who was not paying dues, when he, Thomas, had "all these other people that I have to represent that are paying dues."

Larson did not sign the IEU form. Thomas said he would see about getting a copy of IEU's contract for Larson. That ended the conversation.³⁸

³⁸ Thomas's testimony portrayed on direct and on cross-examination a somewhat sketchy recollection of the two conversations that Larson recounted in his testimony. Thomas, in response to leading questions, flatly denied having told Larson that the Portage store was a closed shop, that membership in IEU was required to work at the Portage store, and that he should watch his "butt" because Thomas could not

In April, in a conversation at the Portage Town & Country store, Trustee Thomas told employee Jeff Kimbrough, in substance, that he should tell “his people”³⁹ that if they did not sign the four part IEU form, Thomas would not represent them. Kimbrough reminded Thomas that one of the items on the form was a receipt for a copy, each, of IEU’s constitution, and the contract with Strack. Thomas had no copies for Kimbrough and his colleagues. Kimbrough said he would not sign the form without the documents. Thomas retorted: “Just tell them if they don’t sign the sheet, then I am not going to represent them.”⁴⁰

In April, employees Anthony Banks and Alice Graham, and approximately four other employees, attended a Strack customer service training session conducted at Woodland Park, in Portage. Early in the session, IEU Trustee Dave Thomas handed copies of the four-part IEU form to Banks, Graham and the other employees, respectively, and instructed them to fill the forms out. Graham read the four-part form and asked Thomas if she had to sign it. Thomas answered yes and added that if she wanted to work at Town & Country, she must sign the form.

Graham signed the form and returned it to Thomas. Graham signed the card because she needed the work.⁴¹

The Board has held that a union violates Section 8(b)(1)(A) of the Act by telling employees that they are working in a closed shop and that they had to be members of the union to retain their jobs. *Communication Workers Local 1101 (New York Telephone Co.)*, 281 NLRB 413 fn.1 (1986). The Board has also recognized that a union violates Section 8(b)(1)(A) by telling employees that it will not represent them unless they are members of the union. *Mail Handlers Local 305 (Postal Service)*, 292 NLRB 1216, 1220 (1989).

In the instant cases, IEU Trustee Thomas’s remarks to employee Larson included statements that Thomas could not represent him unless he was a member of IEU and that Larson must be a member of IEU to work for Strack. I find under the Board’s holdings in *Local 110*, above, and in *Local 305*, above, IEU violated Section 8(b)(1)(A) of the Act. Under the holding in *Local 305*, above, I also find that by Thomas’s remarks to

help him. As Larson seemed to be reliving his encounters with Thomas, and gave his testimony in a frank and forthright manner, I have credited his testimony about them, where it disagrees with Thomas.

³⁹ I find from Kimbrough’s testimony that he took “your people” to mean fellow UFCW supporters. I also find from Kimbrough’s testimony that he and his fellow UFCW supporters had shown support for UFCW to the other Portage store employees.

⁴⁰ My findings regarding Thomas’ remarks to Kimbrough in April are based upon the latter’s uncontradicted testimony.

⁴¹ Thomas denied threatening anyone at the customer service meeting with loss of his or her job for not signing the form he distributed for IEU. However, he admitted telling Graham: “After an employee gets through their 60 days of employment, they’re due to be signed up in the union.” However, he seemed reluctant to provide a detailed recollection of his explanation of the form to the employees at the meeting. This factor and his admission suggest that he might have told Graham that she was obliged to sign the form if she wanted to work at the portage Town & Country. As Graham and Banks impressed me as being objective, unsophisticated witnesses, I have credited their testimony regarding Thomas’ remarks to Graham.

employee Kimbrough that Thomas would not represent Strack employees unless they were members of IEU, IEU violated Section 8(b)(1)(A) of the Act. Finally, I find that under the holding in *Local 1101*, above, IEU violated Section 8(b)(1)(A) of the Act by telling employees Graham and Banks that they could work for Strack only if they were IEU members.

CONCLUSIONS OF LAW

1. Respondent, Strack and Van Til Supermarkets d/b/a Town & Country Supermarkets and Ultra Foods, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent C&T properties was at all times material, an agent of Respondent Strack within the meaning of Section 2(2) and (13) of the Act.

3. United Food and Commercial Workers Union, Locals 700 and 881, a/w United Food and Commercial Workers International Union, AFL–CIO, CLC, and Independent Employees Union of Northwest Indiana, respectively, are labor organizations within the meaning of Section 2(5) of the Act.

4. Respondent Strack has violated Section 8(a)(1) of the Act by:

(a) Interrogating its employees about their union membership, activities, and sympathies.

(b) Threatening employees with loss of hours if they selected United Food and Commercial Workers International Union, AFL–CIO, CLC as their bargaining representative.

(c) Taking pictures and videotapes of employees engaged in union activities.

(d) Engaging in surveillance of its employees’ union activity and giving the impression to its employees that it is engaging in surveillance of their union activity.

(e) Discriminatorily prohibiting its employees from engaging in lawful picketing and handbilling on behalf of UFCW near the exits and entrances of its Portage and Valparaiso stores, respectively.

(f) Threatening its employees with arrest if they engage in lawful picketing and handbilling in front of its Valparaiso store, and causing the arrest of an employee for handbilling on behalf of UFCW, near the exit and entrance of its Portage store.

5. Respondent Strack has violated Section 8(a)(3) and (1) of the Act by:

(a) Suspending employee Annette Peters at the request of Respondent IEU.

(b) Discharging employee Annette Peters at the request of Respondent IEU.

6. Respondent C&T violated Section 8(a)(1) of the Act by discriminatorily causing the removal of Strack’s employees, who were engaged in picketing and handbilling in front of the entrance and exit of Strack’s Portage store.

7. Respondent IEU violated Section 8(b)(2) and (1)(A) of the Act by:

(a) Requesting that Respondent Strack suspend employee Annette Peters because she was engaged in union activity.

(b) Requesting that Respondent Strack discharge employee Annette Peters because she was engaged in union activity.

8. Respondent IEU violated Section 8(b)(1)(A) of the Act by:

(a) Warning employees that IEU would represent them or process their grievances only if they joined IEU.

(b) Telling employees that Strack's Portage store was a closed shop and that employees were required to join IUE as a condition of continued employment.

REMEDY

Having found that Strack, C&T Properties and IEU have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent, Independent Employees Union of Northwest Indiana be required to notify Annette Peters in writing, and to also notify Respondent Strack and Van Til Supermarkets d/b/a Town & Country Supermarkets and Ultra Foods in writing, that it has no objection to Strack's rescinding the suspension and discharge imposed upon Annette Peters and reinstating her to her former position at its Portage

store. I shall further recommend that Strack be required to rescind the suspension and discharge imposed upon Annette Peters, and to remove from its files any reference to Peters' suspension and discharge. I shall further recommend that Strack be required to offer to Annette Peters' reinstatement. I shall further recommend that Strack be required to notify Peters that it has removed the references to those unlawful adverse actions from its files and that it will not use them against her in any way.

I shall recommend that IEU and Strack be required, jointly and severally, to make Peters whole for any loss of earnings and other benefits she may have suffered because of the discrimination against her in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]